

**EXAMINING THE FILIBUSTER:  
THE FILIBUSTER TODAY AND ITS CONSEQUENCES**

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**WEDNESDAY, MAY 19, 2010**

**United States Senate,  
Committee on Rules and Administration,  
Washington, D.C.**

The committee met, pursuant to notice, at 10:10 a.m., in Room 301, Russell  
Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Byrd, Durbin, Udall, Bennett, Alexander, and  
Roberts.

Staff Present: Jean Parvin Bordewich, Staff Director; Jason Abel, Chief Counsel;  
Veronica Gillespie, Elections Counsel; Adam Ambroggi, Counsel; Sonia Gill, Counsel; Julia  
Richardson, Counsel; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk;  
Matthew McGowan, Professional Staff; Justin Perkins, Staff Assistant; Mary Jones,  
Republican Staff Director; Shaun Parkin, Republican Staff Director; Paul Vinovich,  
Republican Chief Counsel; Michael Merrell, Republican Counsel; Trish Kent, Republican  
Professional Staff; and Rachel Creviston, Republican Professional Staff.

**OPENING STATEMENT OF CHAIRMAN SCHUMER**

Chairman Schumer. Our hearing will come to order, and I will begin with my  
opening statement while we wait for Senator Klobuchar.

I want thank everyone for coming. I want to thank my good friend, Ranking

27 Member Bennett, who has been just an invaluable and fair member of this committee,  
28 not only under my Chairmanship, but long before it.

29 I also want to especially thank Senator Byrd for his continued interest and  
30 participation in these hearings. His dedication of leadership, his unsurpassed  
31 knowledge of the Senate Rules and procedures have benefitted us all and we are really  
32 very, very fortunate that he will be joining us later in the hearing. So I ask unanimous  
33 consent that when Senator Byrd arrives, he be permitted to read his opening statement  
34 without objection.

35 Now, we have here as one of our distinguished witnesses the former Senator  
36 from Oklahoma and Republican Whip, Don Nickles, a friend of both of ours. He served  
37 for 24 years admirably in this body. We welcome you, Senator Nickles, and thank you  
38 for having your time with us.

39 Second, there is no former living Senator who can give us more insight into the  
40 evolution of the filibuster and the cloture rule than our first witness, who we are so  
41 honored to have, and that is former Vice President and former Senator Walter Mondale.  
42 As everyone knows, he was 42nd Vice President of the United States. He served two  
43 terms in the Senate representing Minnesota.

44 In early 1975, Senator Mondale, together with Senator Byrd, successfully led the  
45 bipartisan debate which resulted in amending Senate Rule 22, the cloture rule, to  
46 reduce the number of Senators needed to invoke cloture. The Senate first determined  
47 it could change its own rules by a simple majority, and voted three times to set that

48 precedent. Reaction to that precedent, which was later rescinded, resulted in a  
49 compromise. The Senate agreed to move from two-thirds of the Senators present and  
50 voting to the current 60-vote threshold for cloture that still exists, as we all know, today.

51 In 1977, Mr. Mondale, as Vice President, serving also as President of the Senate,  
52 and Majority Leader Robert Byrd played a crucial role in shutting down the post-cloture  
53 filibuster of a natural gas deregulation bill. This action became the main catalyst for  
54 efforts in 1979 to limit post-cloture debate time.

55 There is a great deal of debate between those who believe that under the  
56 Constitution, a majority of the Senate can change its rules and those who disagree.  
57 Today, we will see a glimpse of the Senate at a time when it did face and vote on that  
58 very issue, and it is very important to look at it because it hadn't happened before.

59 This is the second in a series of hearings by this committee to examine the  
60 filibuster. The purpose is to listen and learn so that we can later consider whether the  
61 Senate should make any changes in its rules and procedures, and if so, which ones. I  
62 have not settled on nor ruled out any course of action myself, but as Chairman of the  
63 Rules Committee, I believe we need to fully and fairly assess where the Senate is today  
64 and whether we can make it better.

65 One thing is certain, however. In recent years, the escalating use of the  
66 filibuster has drastically changed the way the Senate works. Our first hearing on April  
67 22 explored the history of the filibuster. We now focus on the filibuster today and its  
68 consequences for the Senate, for all three branches of government, and ultimately for

69 the American people.

70 We learned in our first hearing that the use of filibusters has reached  
71 unprecedented levels. The chart to my right, prepared from facts supplied by the  
72 Congressional Research Service, shows that the use of cloture motions has escalated  
73 rapidly in recent Congresses. Cloture motion counts are useful because they represent  
74 a response to filibuster tactics, actual filibusters, threats, or realistic expectations of  
75 them.

76 During the first period which you see here, from 1917 to 1971, there was an  
77 average of 1.1 cloture motions filed per year. The next period is from 1971 to 1993,  
78 where there was an average of 21 filibusters per year. In the period from 1993 to  
79 2007, that number increased by almost a third to an average of 37 cloture motions per  
80 year. And then we come to the 110th and the beginning of the 111th Congress. We  
81 are now averaging more than 70 cloture motions per year. That is an average of two  
82 per week when we are in session.

83 Before I call on the rest of my colleagues for their statements, I want to highlight  
84 a few statistics about where we stand with our legislative, executive, judicial branches,  
85 and the filibuster. In the legislative branch, not every bill that passes the House could  
86 or should pass the Senate. But as we know, members of the House have been  
87 complaining regularly and rapidly, at least on our side of the aisle, that its bills stall out  
88 in the Senate, and the numbers indicate there is some truth to that. According to the  
89 statistics maintained by the Senate Library, there have been 400 bills passed by the

90 House in this Congress that have not been considered by the Senate. Of those, 184  
91 passed by voice vote. Another 149 passed with the majority of House Republicans  
92 voting yes on a roll call vote, indicating a high degree of bipartisan support, at least for  
93 those over 300 bills.

94 The filibuster is also creating problems for the executive branch. For example,  
95 for fiscal year 2010, half of all non-defense spending, \$290 billion, was appropriated  
96 without legal authority because Congress hadn't reauthorized the programs. Dozens  
97 of Presidential appointments are also being delayed or blocked from floor  
98 consideration. Many of these were approved unanimously by both Democrats and  
99 Republicans in committee and are stuck on the executive calendar because of holds.  
100 That means executive agencies don't have the leadership and expertise to do their jobs  
101 well. Key national priorities are also being undermined. Even nominees to important  
102 national security positions are unreasonably delayed by holds and filibuster threats in  
103 this Congress. This is dangerous at a time when we need a Federal Government using  
104 all its resources to fight terrorism and protect our country.

105 And finally, there is the judicial branch. Today, 102 Federal judgeships are  
106 vacant, a problem which has consequences for Americans from all walks of life, direct  
107 or, more likely, indirect. President Obama has submitted nominations to fill 41 of  
108 those. More than half, 24, have been reported out of the Judiciary Committee yet  
109 languish on the calendar. Of those, 20 were approved by the Judiciary Committee with  
110 bipartisan, often unanimous, support. What is holding them up? Too often, it is the

111 threat of a filibuster by one or a few Senators. It is true that the Senate increasingly  
112 scrutinizes judicial nominations. I myself opposed some of President Bush's  
113 nominations to the bench. However, at this point in George Bush's Presidency, the  
114 Democratic minority Senate had confirmed 52 Federal circuit and district court judges,  
115 but today, the Senate has approved only 20 of President Obama's, even when  
116 candidates have strong bipartisan committee support. So without enough judges to  
117 staff the Federal judiciary, businesses and individuals alike may feel pushed to give up or  
118 settle rather than wait years for their day in court.

119         These are but a few examples of the consequences of the filibuster. So I hope  
120 today's hearings help inform members of this committee, the Senate, and the public at  
121 large about the use of the filibuster and how it affects our government and our nation  
122 today.

123         I look forward to listening to our witnesses, and now I am going to turn over the  
124 podium, of course, to, again, a man for whom I have the utmost respect as both a  
125 Senator and as a person, Robert Bennett.

126

127                                   **OPENING STATEMENT OF SENATOR BENNETT**

128         Senator Bennett. Thank you very much, Mr. Chairman. I appreciate your  
129 chart. Maybe you want to leave it up there, because I am going to have a comment or  
130 two.

131         Chairman Schumer. Great.

132           Senator Bennett. I appreciate your holding this series of hearings and the  
133 opportunity to offer some introductory remarks. The majority has chosen to focus on  
134 what it believes to be the abuse of the filibuster by the minority, but these hearings  
135 have also revealed how the Majority Leader can abuse the rules of the Senate to limit  
136 debate and amendment.

137           At our first hearing, we saw how the leadership tactic of filling the tree to  
138 prevent consideration of amendments really works, and you referred to the  
139 Congressional Research Service, Mr. Chairman. We went there, as well, and they have  
140 a report to which I will be referring that talks about how the Majority Leader can use the  
141 tactic of filling the tree in order to avoid allowing the minority to offer amendments, and  
142 we go back 25 years, that is to 1985, when the Majority Leader was Bob Dole and  
143 document the number of times that the Majority Leader, from Dole to Byrd to Mitchell  
144 to Dole to Lott to Daschle to Frist to Reid have used this tactic. We have studied the  
145 abuses of the Senate rules by the majority, that is, the use of Senate Rule 14 to bypass  
146 regular order and avoid committee consideration, and the decreasing time between the  
147 introduction of a matter and the filing of a cloture petition.

148           Here are some of the statistics, and we go back to the numbers you show on  
149 your chart. During the 109th Congress, Rule 14 was used a total of 11 times. In the  
150 110th Congress, that number grew to 30. CRS reveals that since January of 2007, the  
151 majority has filed cloture the same day that the matter was offered to the Senate, so  
152 that cloture was filed prematurely. Before there was even any threat of a filibuster, a

153 cloture petition that would end up in that large bar that is at the end of your chart was  
154 filed before the minority had even an opportunity to make any comment.

155           Here is the pattern. The current Majority Leader has used this tactic at a rate  
156 more than double that of his predecessor and five times as often as the last five  
157 Majority Leaders combined. So you have all of that building up to the time where now  
158 we have a situation where either Rule 14 or the filing of a cloture petition and filling the  
159 tree occurs immediately in order to make sure the minority does not have any  
160 opportunity to offer any amendments.

161           This has gone unnoticed by the media. I am interested to track the media.  
162 They were very, very much opposed to filibuster when the Republicans were in charge,  
163 very much defending it as a tool of truth and wisdom once the Democrats got in  
164 charge--or the other way around, depending on which side of the media--

165           Chairman Schumer. No, no, no. You were right the first time.



166 Senator Bennett. Okay. Whichever it might be. And so these hearings are  
167 very valuable to let us look at this thing and I appreciate very much the willingness of  
168 Vice President Mondale and Senator Nickles to come give us their views on this matter  
169 and look forward to hearing what they have to say.

170 Chairman Schumer. Thank you. All I would say, and I emphasized this at our  
171 first hearing, this is not--there is plenty of blame to go around, if it is blame. Systems  
172 changed because of the actions of both parties, and the actions seem to switch when  
173 each party is in the minority or the majority. And the question is, for the good of the  
174 Senate over a longer period of time, should we change anything. But you are certainly  
175 right to bring up what you bring up, Senator Bennett, and I think it should contribute  
176 constructively to the debate.

177 Senator Bennett. Thank you. I ask unanimous consent that the CRS  
178 memoranda to which I referred be made a part of the record.

179 [The information of Senator Bennett submitted for the record]

180 Chairman Schumer. Without objection.

181 Usually, I like to let everybody give opening statements, but we have the Vice  
182 President and Senator Nickles waiting. What is your pleasure, Senators Alexander and  
183 Roberts? Do you want to make a couple of brief remarks?

184 Senator Alexander. How about one minute?

185 Chairman Schumer. Great. Whatever you need.

186 Senator Alexander. I don't know if Senator Roberts can speak for one minute.

187 Senator Roberts. Well, I plan to, as usual, shine the light of truth into darkness.

188 That may take a minute and a half.

189 [Laughter.]

190 **OPENING STATEMENT OF SENATOR ALEXANDER**

191 Senator Alexander. Mr. Chairman and Senator Bennett, thank you for the  
192 hearing and we look forward to hearing the former Vice President and colleagues and  
193 Senator Nickles.

194 I would only say two things. One is, it is interesting to me how the Chairman  
195 defines a filibuster. A filibuster by his definition is anytime the majority seeks to cut off  
196 debate or to stop the minority from offering amendments. In Senator Nickles's  
197 testimony, he points out that between January 2007 and April 2010, cloture was filed  
198 141 times on the same day a matter, measure, or motion was brought to the Senate  
199 floor. So the Senate is supposed to be defined by the capacity for virtually unlimited  
200 debate or unlimited amendment, so if you count filibusters by saying these bad  
201 Republicans who happen now to be in the minority have filibustered, the definition of a  
202 filibuster is any time we try to shut the Republicans up.

203 Well, that happened when the Republicans were in charge, and I can vividly  
204 remember Senator Byrd's words to me in our first class, and he will be here to speak for  
205 himself. He said, sometimes, the minority may be right.

206 And as we reflect back upon the time when President Bush was here and the  
207 Republicans were in charge of the Congress, maybe our Democratic friends would think

208 that maybe they were right about privatizing Social Security. They used the filibuster  
209 to prevent President Bush and the Republican Party from privatizing Social Security.  
210 They might say that the country is better off after the great recession because they used  
211 the filibuster. Maybe they were right. They slowed down and prevented a whole  
212 number of other important measures, from tort reform to the appointment of  
213 conservative judges. Maybe they were right.

214 So I think we should not define filibuster by the number of times the majority  
215 seeks to cut off debate, and I think we ought to recognize Senator Byrd's advice that  
216 sometimes the minority may be right.

217 Thank you, Mr. Chairman.

218 Chairman Schumer. Senator Roberts?

219 **OPENING STATEMENT OF SENATOR ROBERTS**

220 Senator Roberts. Thank you, Mr. Chairman.

221 At the last hearing, we detailed--and thank you for your leadership on this--the  
222 marked decline on open amendment rules in the House and the soaring increase in the  
223 closed amendment rules for legislation brought up before that body. To whom can the  
224 American people turn when the House majority runs roughshod over the minority and  
225 the wishes of the public? That is the Senate. The Framers of the Constitution  
226 certainly intended that.

227 There is a temptation, I think, on the part of some members in this chamber to  
228 make the Senate more like the House, to do away with the procedures and the

229 precedents intended to foster compromise and comity.

230           Since 2007, there has been an unprecedented rise in the parliamentary tactics by  
231 the majority to circumvent what we call regular order, and that data is indisputable. I  
232 encourage anyone interested in the subject to witness the trend over the last  
233 three-and-a-half years that is characterized by an increase in the Rule use of 14 to  
234 bypass committees, a decrease in the use of conference committees to resolve  
235 legislation, and a drastic rise in the use by the Majority Leader of a tactic called filling  
236 the tree, which prevents the minority from offering amendments. The use of filling the  
237 tree is more than double that of the previous leader and exponentially greater than the  
238 norm of the last decade.

239           I think these trends are alarm bells. Some critics charge the minority with  
240 obstruction and point to the number of cloture motions filed in the last three-and-a-half  
241 years as evidence of, quote, filibustering. The use of cloture, which is an instrument to  
242 cut off debate, does not really correlate with objections from the minority. A great  
243 many cloture motions, far more than in any previous Congress, are filed the moment  
244 the question is raised on the floor. Thus, debate is cut off before it can even begin.

245           Worse yet, there seems to be a growing inclination intentionally to conflate the  
246 term filibuster with holds. Everybody knows holds are an informal process by which a  
247 Senator submits notice that they object to a unanimous consent request. Typically, a  
248 hold is used to prevent a nomination or a piece of legislation from passing the chamber  
249 without debate or a recorded vote. A hold does not prohibit the Majority Leader from

250 bringing a question to the floor.

251 I would like to reiterate in closing--over my two minutes, I apologize to the Vice  
252 President and to Senator Nickles--the framers of the Constitution had the foresight to  
253 create an institution that was based not on majority rule, but where each State,  
254 regardless of size, had two Senators to speak out on their behalf, to debate, and to offer  
255 amendments. For anyone who doubts that this is what the Framers intended, I  
256 encourage them to revisit the Federalist Papers Number 10, attributed to James  
257 Madison. He states, "Complaints are everywhere heard that the public good is  
258 disregarded in the conflicts of rival parties and that measures are too often decided not  
259 according to the rules of justice and the rights of the minority party, but by the superior  
260 force of an interested and overbearing majority," and that is true whether it is  
261 Republicans or Democrats.

262 Mr. Chairman, the filibuster is an indispensable tool for controlling the effects of  
263 partisanship and factionalism because it compels the majority, regardless of party, to  
264 meet the minority and the American people in the center in order to forge a national  
265 policy that is based on consensus instead of discord. When Don Nickles came up to  
266 shake my hand, who has been a longtime friend, he said, what is happening? And I  
267 said, this place is broken. Help.

268 With that, Mr. Chairman, I thank you very much, and I apologize to the  
269 gentlemen who are waiting patiently.

270 Chairman Schumer. I think your concluding lines would find favor with the

271 majority of Senators, whatever our diagnosis is, and that is the reason we are having  
272 these hearings.

273 Senator Durbin, our Democratic Floor Leader?

274 **OPENING STATEMENT OF SENATOR DURBIN**

275 Senator Durbin. Thank you, Mr. Chairman. It is good to see the Vice President  
276 and I thank all of you who are here to testify today.

277 I am completing a book now which is a biography of Mike Mansfield and his  
278 tenure as the Majority Leader and there was an interesting early chapter there in 1963,  
279 when there was a debate in the Senate over the Satellite Communications Act and  
280 Wayne Morse initiated a filibuster against the Satellite Communications Act. It  
281 became a celebrated cause because the Democratic majority was split. The Southern  
282 Democrats, who had argued you should never cut off debate, because they didn't want  
283 to go to the civil rights votes, were in a quandary because they wanted to move to the  
284 satellite bill and it meant that they had to cut off debate, vote cloture against Wayne  
285 Morse's filibuster on the satellite bill.

286 Ultimately, they made the decision to go forward and over 70 Senators voted for  
287 cloture to stop the filibuster by Wayne Morse. That is an interesting footnote, but the  
288 closing sentence was, I thought, the most memorable part. It was the fifth time in the  
289 history of the Senate there had ever been a motion for cloture, 1963, the fifth time.

290 And so this institution which we are a part of and which respects the rights of  
291 minorities within the institution has functioned throughout its history respectful of

292 minorities, but has not gone to the extremes we have now reached where we are now  
293 using the cloture motions and filibusters as commonplace. So we have gone beyond  
294 deliberation to somewhere near deadlock. For some, that complements their political  
295 philosophy. They don't want the Senate to do anything, and I guess that is an  
296 approach that can be served by this use of the rules. But I don't think it serves our  
297 purpose in society at large or our purpose in this nation, where we are expected to  
298 deliberate but to decide.

299 In the last six weeks, I can tell you what our business has been. We spent one  
300 entire week in the Senate debating on whether we would extend unemployment  
301 compensation by four weeks. We spent the next week in the Senate debating five  
302 nominees, all of whom passed with more than 60 votes. So there clearly was very little  
303 controversy associated with them. And now we are on our fourth week on the Wall  
304 Street reform bill, which we hope to invoke cloture on this afternoon. At this pace,  
305 there are so many major issues facing this nation and the Senate that cannot be  
306 considered. I think it is part of a strategy. Unfortunately, the rules complement that  
307 strategy and benefit that strategy.

308 Now, I have been on the other side of this argument, as well. I was a whip  
309 when we were in the minority position with 45 votes and I needed to find 41, when  
310 necessary, to stop cloture. So I know that you have to look at this from both sides of  
311 the perspective.

312 But I do believe that we have reached a point now where the American people

313 are losing faith in this institution and I don't think, whatever our purpose may be, that if  
314 that is the ultimate result, that we are serving our democracy. We have got to find a  
315 reasonable way to respect the minority but to stop what I think is clearly a destined  
316 gridlock for this great institution.

317 Thank you, Mr. Chairman.

318 Chairman Schumer. Thank you, Senator Durbin.

319 And now, I will ask unanimous consent that my introductory remarks be added  
320 to the record, because we have someone far better at introducing the Vice President.

321 [The prepared statement of Chairman Schumer submitted for the record]

322 Chairman Schumer. So we would ask Senator Klobuchar and, of course, Vice  
323 President Mondale to take their seats at the table. Senator Klobuchar?

324 **INTRODUCTION OF HON. WALTER F. MONDALE BY HON. AMY KLOBUCHAR, A UNITED**  
325 **STATES SENATOR FROM THE STATE OF MINNESOTA**

326 Senator Klobuchar. Thank you very much, Mr. Chairman, members of the  
327 committee, Senator Nickles.

328 It is such an honor to be here to introduce the Vice President. As you can  
329 imagine, he is revered in our State, and you should know that my first job in Washington  
330 was as an intern, and my first assignment as his intern was to do a furniture inventory of  
331 all of the Vice President's furniture as well as his staff's. It was a project that took two  
332 weeks. I wrote down the serial numbers of every piece of furniture, and I can tell you  
333 that I tell students, take your internship seriously, since that was my first job in



334 Washington and this was my second job in Washington.

335 [Laughter.]

336 Senator Klobuchar. I will also tell the members of the committee that nothing  
337 was missing--

338 [Laughter.]

339 Senator Klobuchar. --so you have a very honorable witness here with you.

340 You think about the Vice President's career and everything he has done, the  
341 crusading Attorney General in Minnesota, a leader in the United States Senate, a Vice  
342 President who really defined the role of the modern Vice President, the Ambassador to  
343 Japan. When I was there recently, they referred to him in Japanese, which I will not  
344 attempt, as "The Big Man," he was so respected when he was in Japan. And he made  
345 that very courageous decision when Paul Wellstone tragically died to have to take up  
346 the mantle for our party with only a week remaining in the election. And while he was  
347 not successful, he handled it, as he has done everything in his life, with such civility and  
348 such dignity.

349 One part of his biography that is often overlooked that you will hear about today  
350 is when he was in the Senate, frustrated with the lack of getting things done, as Senator  
351 Durbin so eloquently spoke about, and decided to take on the power structure. It is  
352 really an amazing story, and he was, in fact, successful--maybe not successful enough, as  
353 we see where we are right now, but at that time, he made a major change, and so I am  
354 sure he will enlighten the committee with his stories and knowledge, and it is my honor

355 to introduce the Vice President.

356 Chairman Schumer. Vice President, your entire statement will be added to the  
357 record, and you may proceed as you wish.

358 **STATEMENT OF HON. WALTER F. MONDALE, DORSEY AND WHITNEY LLP,**

359 **MINNEAPOLIS, MINNESOTA**

360 Mr. Mondale. Thank you, Senator Klobuchar, for your kindness in introducing  
361 me today. We are very proud of Amy in Minnesota, and from what I understand, the  
362 nation shares that pride today, and I am honored that she would be present with me at  
363 the commencement of this hearing.

364 Mr. Chairman, I am very grateful to the committee for conducting these hearings  
365 on the need to reform the rules to protect debate and deliberation, so central to the  
366 unique role of the U.S. Senate, while removing flaws in the procedures that experience  
367 has proven fuel obstruction and paralysis.

368 Perhaps I was asked to testify because of my involvement in the successful  
369 bipartisan battle to reform Rule 22 in the 94th Congress, where we reduced the number  
370 of members required to invoke cloture from a maximum of 67 to 60. At about the  
371 same time, led by Senator Byrd, we changed the post-cloture rules so that at a time  
372 certain following cloture, the Senate would have to vote on the underlying measure,  
373 because we were developing at that time a post-cloture filibuster technique which led  
374 to endless delay.

375 My cosponsor, Jim Pearson from Kansas, a Republican, and I called up our

376 proposal at the very opening of Congress. Our strategy was based on the  
377 constitutional right of the Senate to propound its own rules by a majority vote. Vice  
378 President Rockefeller, ruling from the Chair, supported our position. The Majority  
379 Leader, Mike Mansfield, a wonderful human being and leader, appealed the Chair's  
380 initial ruling, an appeal we then successfully moved to table on a non-debatable motion.

381 In that long and sometimes bitter fight--I think we were on the floor for a month  
382 or more--the Senate on three separate occasions voted to sustain the constitutional  
383 option, the principle that a majority vote could change the rules. After the sense of  
384 the Senate became clear, Mike Mansfield and Bob Byrd, also with Russell Long, working  
385 with the Republican leadership, reached the negotiated compromise that I just outlined,  
386 and those are basically the rules that govern the Senate today.

387 As we completed that process, an argument occurred about whether the Senate,  
388 in reaching the compromise rules, erased the effect of the majority-vote motions to  
389 table that I referred to earlier. I think Senator Cranston said it best when he said,  
390 "Upholding the [eventually successful] Mansfield point of order only adds one tree to a  
391 jungle of precedents we reside in. But above and beyond that jungle stands the  
392 Constitution, and no precedent can reverse the fact that the Constitution supercedes  
393 the rules of the Senate that the constitutional right to make its rules cannot be  
394 challenged."

395 At about the same time, Senator Byrd, who was the key leader in these rules  
396 reforms, said that at any time that 51 Senators are determined to change the rule and

397 have a friendly presiding officer, and if the leadership joins them, that rule can be  
398 changed and Senators can be faced with majority cloture.

399 That constitutional precedent remains today. Some argue that the rules  
400 themselves require a two-thirds vote for any amendment, but as I said earlier, I think  
401 the Constitution answers that question: a determined majority can change the rules.

402 We took that bold step in 1975 to reduce the cloture requirement because we  
403 had become paralyzed. We were in a ditch in the Senate and many of us saw an abuse  
404 of the rules. Jim Allen of Alabama was a rules wizard. He had a coterie of allies who  
405 began the march toward what we see today, the use of cloture to paralyze the Senate,  
406 preventing it from acting on any issue that a motivated minority might seek to block.  
407 The constitutional remedy was invoked by majority rule in 1975, and the compromise  
408 was adopted by a large bipartisan vote.

409 While the circumstances then differ in detail from what you confront today,  
410 fundamentally, what we see now is the logical extension of the paralysis we faced then.  
411 The Senate, in fact, has evolved into a super-majority legislative body. The  
412 ever-present threat of filibuster has greatly enhanced the ability of a single Senator,  
413 simply through a hold on a nominee or a measure, to prevent any consideration and to  
414 do so secretly. Many members of the Senate have said that this body is in crisis.  
415 Many scholars have said that the crisis is more severe than it has ever been before.

416 I am heartened to see, particularly among newer members of the Senate, and I  
417 hope in the Senate at large, that there is a growing demand for rules reform, and I hope

418 these rules will be ready for adoption at least by the beginning of the next session.

419           Let me just mention two suggestions that I have. One, weaken the power of  
420 holds by making a motion to proceed either non-debatable or debatable for a limited  
421 number of time, say, two hours. This change has been suggested many times over the  
422 years, but today's Senate demonstrates how badly it is needed. The rules should  
423 provide that the consideration of any nominee or the debate on any measure can begin  
424 –begin, not end-by a traditional motion to proceed requiring only a majority vote.

425           Secondly, I would hope that the joint leadership could shape a reformed Rule 22,  
426 as we did in 1975, that would reduce the number of Senators required for cloture from  
427 the present 60 to, say, somewhere between 58 and 55. There is no magic number.  
428 You will notice I do not want to get rid of the filibuster, but as I will argue, I think we  
429 need a different number.

430           Then, we tried to find the line that would assure deliberation and prevent  
431 debilitation. The number 60 worked for us then, but in this harshly partisan Senate of  
432 today, I believe it is a hill too high. However, it would worry me to reduce the cloture  
433 requirement all the way down to a simple majority to end debate. It might be more  
434 efficient, but the Senate has a much higher calling. It must ventilate tough issues. It  
435 must protect the integrity of our courts. You must shape the fundamental  
436 compromises reflecting our Federal system. And at times of great passion, you must  
437 help us find our way, lead us forward, and hold us together.

438           I served in the Senate during the most perilous times of executive abuse, when

439 wars were begun and escalated, when funds were spent or withheld, when civil liberties  
440 and civil rights were under assault - all with little public awareness; and no  
441 accountability to the legislative branch - and it was only when basically here in the  
442 Senate that Senators stood up and used their special stature that we began to make a  
443 change. And that is why I don't want to get rid of the filibuster entirely.

444         Ironically, however, the use of that right as now practiced threatens the  
445 credibility of the Senate and its procedures and, I think, adds to the incivility that we  
446 discuss. The filibuster should not be used to frustrate the very purpose of the Senate  
447 procedures, to foster discussion, even extended discussion, to enhance public  
448 understanding.

449         The constitutional authority to advise and consent found in the Senate for  
450 Presidential nominations is one of the Senate's most important responsibilities. Yet  
451 there can be no consent without debate and there can be no debate if a minority of  
452 Senators, even a single Senator, can bar the Senate from giving its consent. Under the  
453 same constitutional provisions that give the Senate the power to change Rule 22 by  
454 majority vote, it can change its procedures for bringing nominations to the floor.

455         The Senate's leadership should have the authority, sustained by a majority and a  
456 ruling of the presiding officer, if necessary, to bring nominations to the Senate. In  
457 addition, the Senate's leadership has the ability to suspend until a particular nomination  
458 has been resolved the two-track system that has permitted more filibusters, in effect if  
459 not in name.

460           One of the things we did back in 1975, in addition to reducing the number  
461 required for cloture, was to institute the two-track system. So the old idea that if you  
462 wanted to filibuster, you had to get on the floor and make a spectacle of yourself, "Mr.  
463 Smith Goes to Washington," and the whole nation and the world can see what you were  
464 doing had been replaced by a more subtle, silent filibuster that allowed for more  
465 efficiency in getting the huge backlog of Senate business conducted, but it had a  
466 negative side effect because it reduced almost all public attention and public  
467 responsibility for instituting filibusters and now the holds that, in my opinion, are based  
468 upon the filibuster.

469           I am going to submit the rest of my testimony for the record, but let me just  
470 close with one statement. When the restored Old Senate Chambers were dedicated  
471 here some years ago, I think Howard Baker was selected to speak at those ceremonies  
472 for the Republicans and Tom Eagleton was selected to speak for the Democrats. And  
473 Senator Eagleton pointed out the unique and even sacred role that the Senate has in  
474 sustaining the values and the laws and the unity of our country.

475           He said, "Here in this room has been sheltered the structural side of our  
476 democratic government for decades. The government's life force, what makes it work  
477 and endure, is our capacity to accommodate differences and to find a way beyond  
478 parochial, partisan, and ideological concerns to live together as a free nation." I think  
479 that is the Senate's unique role, and that is why the work of this committee and the  
480 decisions of the Senate on how it will conduct itself are so crucial to our future. Thank

481     you.

482             [The prepared statement of Mr. Mondale submitted for the record]

483             Chairman Schumer. Thank you, Mr. Vice President. That was outstanding  
484 testimony. You described better than I have heard in a paragraph why people don't  
485 stand up and debate the way they did when Jimmy Stewart, which is a question all of  
486 our constituents ask us all the time.

487             Now, we have a little bit of time issues here. Senator Nickles, I believe you  
488 have to leave by 11:15. If you wouldn't mind, Mr. Vice President, because I know you  
489 were going to stay--no, stay where you are, if you don't mind--maybe we can have, with  
490 the committee's permission, Senator Nickles do his testimony, and then we will ask  
491 them questions together. Is that okay with everybody?

492             Thanks. Okay, so let me introduce Senator Nickles briefly. Well, we all know  
493 Senator Nickles. He was an outstanding leader here for 24 years, Republican Whip,  
494 and played a major role in many different pieces of legislation. It is very kind of you to  
495 come and give us your views. Without objection, your entire testimony will be read in  
496 the record and you can proceed as you wish.

497             **STATEMENT OF HON. DON NICKLES, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, THE**  
498                             **NICKLES GROUP, WASHINGTON, D.C.**

499             Mr. Nickles. Mr. Chairman, thank you very much, and I appreciate your  
500 accommodation. I think the world of the Senate. I spent 24 years in this institution.  
501 I love the Senate. I even served on this committee for a short period of time, and I



502 think, as Senator Durbin, you called it a great institution. It is a great institution. I  
503 was with Senator Cochran this morning and he called it a very special place, and it is a  
504 very special place.

505 I sometimes participated in indoctrinating new Senators, or newly-elected  
506 Senators, and I would usually tell them, the Senate is special for a couple of reasons, but  
507 amongst legislative bodies, it is really special because unlike the House and unlike most  
508 parliament procedures, members of the Senate have unlimited debate and unlimited  
509 opportunities to offer amendments. Sometimes the rules curtail that, and I kind of  
510 shudder when that happens because that infringes on what really distinguishes the  
511 Senate as being such a unique body.

512 So rules of the Senate, and I heard Senator Mondale talk about the abuse of the  
513 rules, but the abuse of the rules can go both ways. And certainly if the rules are used  
514 to abort debate, not shut down debate, but just eliminate debate or eliminate  
515 amendments, I find that offensive to the traditions of the Senate. Some of the  
516 proposals that some people are talking about really would alter the Senate in a way that  
517 makes the Senate much more like the House of Representatives, and that would be a  
518 serious, serious error.

519 I know many of you had the pleasure of serving in the House as well as the  
520 Senate. I did not. But I really beg you not to turn the Senate into a legislative body  
521 that is very comparable to the House. Granted, you can do a lot of things. You can  
522 do a lot of things very quickly. You can do a lot of things with very limited debate and

523 with the majority vote. That is not the Senate that I served in for 24 years and it is not  
524 the tradition of the Senate and it wouldn't be good for the country. It wouldn't be  
525 good for the legislative process, either.

526 Our forefathers showed great wisdom and our leaders in the past, including  
527 Senator Mondale and others that have worked to develop the rules, and the rules aren't  
528 perfect, but they can be abused. I think cloture, by its very nature is somewhat  
529 abusing the process. It is being used way too much and there are way too many,  
530 quote, "filibusters," but I would really question what is a filibuster. I can only  
531 remember a few filibusters in my career.

532 I do remember laying on a cot at night just off the Senate floor when we are  
533 going on and on and on shortly before Christmas, having other members talking about  
534 cussing those--not talking about cussing, they were cussing members of the Senate who  
535 were keeping us here so close to Christmas--it probably sounds familiar to what you all  
536 were hearing this past Christmas season--because I was involved in it. That was over a  
537 nickel-a-gallon gasoline tax, I think, in 1982, and it was very contentious.

538 But we didn't have many filibusters in that period of time. This growing  
539 explosion of filing cloture--cloture, the whole idea was to limit debate and limit  
540 amendments, but unfortunately, now, cloture is being used to shut off debate and shut  
541 off clotures. There is a big difference. And when cloture is used to shut off debate  
542 and shut off amendments prematurely, that is wrong. There is a right way to legislate  
543 and a wrong way to legislate, and if you are curtailing individual Senators' ability to offer

544 amendments prematurely--and I say prematurely, and that is a judgment call.

545 I know the bill that is on the floor of the Senate--and I was working with Senator  
546 Durbin, I wanted to see his amendment--I was worried, would this get in before cloture  
547 was filed. And I am sure that there are hundreds of amendments that are pending  
548 right now that many members and other people are saying, boy, I hope that gets in  
549 before cloture is filed because it is going to knock our amendment off, and that will  
550 probably be a determining factor whether you get cloture.

551 But I compliment Senator Dodd and I compliment Senator Reid. At least you  
552 had the bill on the floor and it was debated. It was amended. Democrats and  
553 Republicans did get to offer amendments. That is a healthy change. We used to do  
554 that all the time. We used to have authorization bills on the floor, subject to  
555 amendments, so Democrats and Republicans could offer a lot of amendments before  
556 cloture would come down. And now, cloture is being pulled--I call it a quick-draw  
557 cloture. It is being filed way too quick, way too often.

558 A couple of other comments I will make that are the same thing, and I have  
559 heard both Senator Alexander and Senator Roberts and Senator Bennett mention, and  
560 that is Rule 14(b), bypassing the committee process. And I am well aware of the fact  
561 that we did it at times when Republicans were in control. But it is happening on an  
562 accelerating basis. The rate that that is happening now is accelerating.

563 What does that mean? It means we don't go through committee markup.  
564 That means the bill is usually written in the Leader's office. Well, I was in leadership

565 for 14 years. I had my hands on a lot of pieces of legislation that we were involved in.

566 But bypassing the committee, in my opinion, is a mistake. Committees in general

567 usually have bipartisan markups where members are able to massage and legislate.

568 I think the health care bill that Senator Baucus marked up with Senator Grassley,

569 they had hundreds of amendments. That was done well in committee. It wasn't

570 done well afterwards, in my opinion. Then it went to the Leader's office. That is not

571 the Senate working its will. Bypassing the committee process is dangerous. The

572 same thing, whether there is energy legislation. When you have major pieces of

573 legislation, it is very important it go through the committee process, let all members on

574 the committee who have experience and expertise be able to amend it, to massage it, to

575 work on it, as well as on the floor.

576 And the same thing would apply to filling the tree. And again, I know

577 Republicans did it, but I know it is also happening on a much more rapid pace today.

578 That is a serious mistake. That is a serious infringement on a Senator's ability to be

579 able to offer amendments and to be able to debate. And I think when we did it,

580 looking back, I think we made a mistake.

581 So any time that the Senate by the use of rules, filling the tree, bypassing

582 committee or filling cloture prematurely and denying Senators the opportunity to

583 debate or amend, in my opinion, curtails the Senate from being the great tradition, the

584 great legislative body, the great deliberative body which is so crucial to passing positive,

585 good, bipartisan legislation.

586           Lowering the threshold required for cloture, in my opinion, as well, would be a  
587   mistake, because that is a threshold that almost by definition requires bipartisan  
588   involvement. It requires some cooperation. You lower that, you increase the  
589   tendency or the likelihood for basically the dominant party at the time to steamroll, and  
590   that, in my opinion, is not good for the process and it is not good for the American  
591   people.

592           I think the rules can be adjusted, but maybe adjusted more by--maybe I will take  
593   an example, Senator Mondale's comments when you talk about maybe changing the  
594   time on motion to proceed. For the most part, we didn't have filibusters on motions to  
595   proceed in the past and you shouldn't in the future. Just having an agreement with the  
596   majority and minority to say, we won't filibuster the motion to proceed as long as you  
597   give us ample time to debate and amend. And as long as that understanding is there,  
598   we won't filibuster the motion to proceed. You could eliminate lots of those cloture  
599   petitions. You could save two or three days on debating a motion to proceed and  
600   actually be amending a bill and make real progress. That is just a suggestion.

601           Mr. Chairman, thank you.

602           [The prepared statement of Mr. Nickles submitted for the record]

603           Chairman Schumer. Well, thank you, and I think just putting your testimony  
604   and Vice President Mondale's next to one another is great because it shows that there  
605   are some different points of view, but there is a need to fix the system and some areas  
606   where we can agree. There is often difference in interpretation as to what is causing

607 all of these problems, but as I just said to Senator Bennett, maybe there is a way we can  
608 come up with a bipartisan way to fix things, that deals with both sides' legitimate  
609 complaints.

610 The first question I have is for--and I know Senator Udall just got here late. He  
611 has been instrumental, by the way, in having these hearings and leading them and he  
612 wants to give an opening statement. Because of our time constraints, what I would  
613 like to do is just give you some extra time when your question period occurs, if that is  
614 okay.

615 Senator Udall. That would be great, Mr. Chairman. Thank you.

616 Chairman Schumer. Okay. My first question is to Senator Mondale--Vice  
617 President-slash-Senator-slash-great American Mondale. The nub of this debate, not in  
618 terms of how to fix it but whether we even can fix it, is the contrast of the Constitution,  
619 the Article I, the Senate 'shall make its own rules,' versus the rule that is now in place in  
620 terms of having a majority of the Senate be elected before you can change the rules,  
621 two-thirds, and you mentioned what Senator Cranston said. Was there much debate  
622 back in 1975 about the contrast of those two positions? Could you just elaborate a little  
623 more, because that is going to be the nub of the issue if we should attempt to change  
624 anything. Even if, say, Senator Bennett and I were to agree on what changes could  
625 occur, another Member who wouldn't agree could still force us back into that  
626 conundrum.

627 Mr. Mondale. Yes, there was- intense debate. One of the key elements of the

628 debate was between our position that the Constitution conferred upon the Senate the  
629 ability to change its rules by a majority vote, at least at the opening of the session - so I  
630 read the rule as not limited to that, but that is why I say "at least" - and some of the  
631 opponents who said everything is controlled by Rule 22 as inherited and it can only be  
632 amended under those rules, the Senate is a continuing body, and the other arguments  
633 that you have all heard again and again.

634           So that issue was totally vented. That was the issue contained in the motion to  
635 table, which we tabled, and our argument was, as Senator Cranston put it so well, as  
636 Bob Byrd pointed out during this debate, that a majority of the Senate with a  
637 cooperating presiding officer and leader could invoke majority cloture on its own. In  
638 other words, the constitutional power was there. That was very much at the heart of  
639 the debate.

640           We argued that if the Framers wanted the Senate to have a higher voting  
641 requirement to change the rules, it would have provided it, because in five or six places  
642 in the Constitution, such as confirmation, treaty ratification, and some other measures,  
643 it provides specifically that two-thirds of the Senate are required. So we think there  
644 are a lot of strong arguments for the majority vote principle that we made and  
645 sustained in that debate.

646           Chairman Schumer. Would you want to comment on that, Senator Nickles?

647           Mr. Nickles. Just a couple of comments. One, I served--since I have been in  
648 town, leadership has changed in the Senate six times. With Senator Mondale, in that

649 period, the Democrats controlled both Houses for decades. And now you have much  
650 more volatile leadership changes, and I can tell you, if you read past comments from  
651 Democrats and Republicans, their vantage point and viewpoint changes whether they  
652 are in the majority or the minority.

653 Chairman Schumer. Absolutely.

654 Mr. Nickles. Long-term, I think 60 is a very good number and I would hate to  
655 think the Senate would reduce that number. And Senator Alexander alluded to it.  
656 President Bush had control of both Houses. If the Senate would have moved to a  
657 majority number, say 51, there was no limit what could have been passed.

658 The Senate having a higher number, having 60--and I like 60. I think maybe 67  
659 might have been too high. Sixty is a pretty good number. It makes the majority work  
660 with the minority and--

661 Chairman Schumer. But do you think we could change it based on the  
662 Constitution?

663 Mr. Nickles. No, I am not--

664 Chairman Schumer. Should we want to?

665 Mr. Nickles. Well, one, I think it would be a disastrous mistake--

666 Chairman Schumer. Right.

667 Mr. Nickles. --a disastrous mistake for the Senate if you want the Senate to be  
668 a deliberative body, if you want the Senate to be different from the House.

669 Chairman Schumer. Right.



670 Mr. Nickles. If you want a majority body where 51 individuals can ram things  
671 through, that is not the Senate I know and love.

672 Chairman Schumer. I am not asking about 60. I mean, let us just take the  
673 motion to proceed. Do you think the Senate could change that rule by a majority  
674 vote? Let us say Senator Bennett and I agreed that was the right thing to do in  
675 exchange for you not being able to fill the tree in certain ways.

676 Mr. Nickles. I think--

677 Chairman Schumer. Do you think we could do that?

678 Senator Bennett. I would stipulate that that agreement is hypothetical.

679 [Laughter.]

680 Mr. Nickles. I think what would be much preferable, instead of changing the  
681 rules, would be to have basically a caucus agreement, Democrats and Republicans  
682 saying, we are not going to filibuster motions to proceed. In exchange, we expect time  
683 and amendment opportunities. Don't shut us out. Don't fill the tree. Let us  
684 legislate like we should. I think you can do that with a handshake without amending  
685 the rules.

686 We are a continuous body. The rules do continue into the next time. I know if  
687 you went into January and said, oh, under the Constitution, we are going to rewrite the  
688 rules, somebody would say, the existing rules are still in existence. The officers of the  
689 Senate are still in existence. And so to do that, you are going to have to have 60 votes  
690 to get there, or 67, actually--

691 Chairman Schumer. Sixty-seven.

692 Mr. Nickles. --67 to amend the rules. I would prefer, instead of amending the  
693 rules, I would urge you not to get in that battle.

694 One, I would expect, even predict, that the viewpoint is going to change after  
695 November, what threshold you would want. I would just encourage you--like I said, it  
696 has changed six times since I have been up here. It will change again. Sixty is a good  
697 number. It works.

698 And people say the Senate doesn't work. Senator Roberts said the Senate is  
699 broken. There are a lot of things that are broken about the Senate, but you don't have  
700 to change the rules of the Senate to fix it. A lot of it could be done--Harry Reid--I was  
701 Republican Whip and Harry Reid was Democrat Whip for six years. We got along very  
702 well. We never had a problem, never had a problem. And I can't help but think  
703 leadership working together, maybe the whole caucuses working together, saying, wait  
704 a minute. This is getting carried away.

705 One Senator shouldn't be able to place holds on people forever. And people  
706 think holds stop all these nominations. No. All it does is say, I wish to be consulted.  
707 Consult him to say, now we are bringing up the nominee, and if you want to block the  
708 nominee, get prepared to speak because we are going to stay on the nominee until we  
709 are finished. People have a right to be notified. The Senate operates a lot on  
710 unanimous consent. Individual Senators have the right to be notified before you bring  
711 up the nominee or the bill so I can participate in the debate. That makes sense. But

712 they don't have a blanket right to stop everybody indefinitely forever.

713           So the hold, the perception of the hold, I think, has been greatly blown out of  
714 proportion. I hope that we don't get in the tradition of filibustering judicial nominees.  
715 That came up in the last few years. I think that was a mistake. I mean, the tradition  
716 was, we had big debates over Judge Bork and Judge Thomas and really not so much  
717 on--on some nominees, but we still allowed a majority vote and I am glad that we did.

718           Chairman Schumer. Thank you.

719           Senator Bennett? I mean, there are so many questions, but we want to move  
720 on here. This is such very good testimony.

721           Senator Bennett. Thank you very much, and thanks to both of you for your  
722 insightful comments.

723           I, as a relatively new member of this body at the time, remember a situation  
724 where President Clinton sent up a nominee that some members of our conference  
725 didn't like. We didn't have enough votes at the time, even though we were in the  
726 majority, we didn't have enough votes to defeat the nominee because there were some  
727 Republicans that would go with the Democrats and the nominee would get 51 votes.  
728 And the question came up, well, let us filibuster. We have got 41 who are opposed.  
729 Let us filibuster. Senator Lott, the Majority Leader, said, absolutely not. The tradition  
730 in the Senate is you do not filibuster judges. And my colleague from Utah, Senator  
731 Hatch, the Chairman of the Judiciary Committee, said the Leader is absolutely correct.  
732 Under no circumstances do we filibuster judges. And so some of the others who were

733 making this case said, oh, all right.

734 And making your point, Senator Nickles, Senator Hatch said, the time will come  
735 when we will have a President, and if we filibuster their judge with their President, they  
736 will then have the precedent to filibuster our President's proposal for judgeship. And  
737 when Miguel Estrada came before the Senate and Senator Daschle, as is his right under  
738 the rules, changed the precedent, we saw a sea change in the way things were done  
739 around here.

740 And that was the point at which I discovered that precedents trump the rules.  
741 Precedents are easy to change when they are different than the rules, but the  
742 precedent that you don't filibuster judges got changed, and now, Mr. Chairman, you  
743 have heard the exchange on the floor. When a Republican was going to filibuster a  
744 Democratic judge proposed by President Obama and some of our Democratic  
745 colleagues started quoting back to us our own statements that we said, no, you don't  
746 filibuster judges, Senator McConnell, as the Leader, said, I made that statement, I  
747 believe that statement, but you changed the rules and we are now operating under your  
748 rules.

749 I don't know quite how we rewrite some of the rules to fit some of the precedent  
750 of comity that we had, but that is the problem we are facing. Under the rule, you can,  
751 indeed, file a cloture petition the same day the bill comes down and you can fill the tree  
752 immediately.

753 And I remember Senator Byrd doing that as Chairman of the Appropriations

754 Committee on the first supplemental bill when I got here brand new as a freshman  
755 Senator, and the Republicans raised a huge outcry about how unfair that was and  
756 backed him down, not with votes, but simply the strength of their argument. And I  
757 remember very clearly--you remember the things when you are a freshman  
758 Senator--when Senator Byrd more or less apologized to the Republicans and said, no,  
759 we will allow amendments. We will allow this to happen. And he backed away from  
760 it and the filled tree--I wasn't smart enough to know how they did it under the rules, but  
761 the filled tree somehow went away and we went ahead with this.

762           So even in the relatively brief time I have been here, I have seen a sea change as  
763 we have moved from the kind of circumstance you describe, Senator Nickles, where  
764 people sit down and work it out on the basis of precedent and comity behind the scene,  
765 to a situation where the rule is taken to the extreme, and once it is, whichever party  
766 does it, then enables the other party to do it back when the control in the Senate  
767 changes.

768           I have no questions for you, just that comment, listening to the two of you and  
769 your experience and then adding my own experience, that we should be very, very  
770 careful as we proceed in these waters because we can mess things up pretty badly, and  
771 even under the present rule, if we are not careful.

772           Thank you, Mr. Chairman.

773           Mr. Nickles. Senator Bennett, if I could just make one comment, a lot of this  
774 could change if you had several Senators on both sides who said, you know what? I am

775 always going to protect your right to offer amendments if you will always protect my  
776 right to offer amendments. If you have enough Senators do that, then cloture is not  
777 invoked the first time or two. There was even a tradition when I was first elected that  
778 some Senators wouldn't vote for cloture the first time or two, just because on that very  
779 principle. They always thought we should have maybe a little more debate and a little  
780 more amendments. And if you had more debate and more amendments, a lot of the  
781 hostilities and partisan fever goes away. People get pent up.

782 I am not aware of how many amendments are pending or are going to be shut  
783 off on the financial bill, but I know there are a lot. But at least the bill has been on the  
784 floor and it has had some amendments. I love seeing authorization bills, and as a  
785 former Senator, I loved having an authorization bill on the floor subject to amendment.  
786 And I, frankly, even liked the idea that we didn't have a germaneness requirement. So  
787 you could be on a bill and offer something totally out of the ballpark, even have a little  
788 fun that way. And it is all right to have a little fun. You should have some fun. And  
789 you can express yourself that way instead of being so bottled up and so restricted that  
790 you never get a chance to offer your amendment. That increases the partisan tensions  
791 dramatically.

792 Chairman Schumer. I know you have to go, Senator Nickles, but we thank you  
793 for your testimony.

794 Mr. Nickles. Mr. Chairman, thank you very much.

795 Chairman Schumer. Thank you for being here.

796           We are going to continue the questioning with the Vice President, and Senator  
797 Udall, you can make an opening statement as well as ask some questions.

798           Senator Udall.   Senator Nickles, is it 11:15 you have to leave?

799           Chairman Schumer.   Yes.

800           Senator Udall.   Because you have two minutes here.   I would just like to--

801           Mr. Nickles.   Absolutely.

802           Senator Udall.   Senator Schumer asked you the question about the  
803 constitutional option, and you are a lawyer, is that correct?

804           Mr. Nickles.   No.

805           Senator Udall.   Oh, you are not?   Okay.   Okay.   Well, then no wonder you  
806 evaded the question, then.

807           [Laughter.]

808           Mr. Nickles.   I would think--

809           Senator Udall.   But do you have an opinion?   I mean, he basically was asking,  
810 you know, he gave a hypothetical and Senator Bennett said he wouldn't stipulate to it,  
811 but the problem we have today that you are describing, and you said it very well, you  
812 said several times there are way too many filibusters.   That is your quote.   The  
813 filibuster is being used too many times.   I mean, that is what we are seeing over and  
814 over again.

815           To change that, the key is, as Vice President Mondale said, to be able to move  
816 with 51 votes and be able to do it as a majority under the Constitution.   Do you have

817 an opinion on that? The Constitution says in Article I, Section 5, each House may  
818 determine the rules of its proceedings, and the vote by 51 votes at the beginning of a  
819 Congress. Do you have an opinion on that?

820 Mr. Nickles. Yes. I think it would be a disaster if you did it.

821 Senator Udall. Well, no, but can you do it?

822 Mr. Nickles. Well, one, you still are operating the rules under--it is a continuous  
823 body. You don't have 100 percent of the Senate--

824 Senator Udall. Well, your answer is then no, I think.

825 Mr. Nickles. That would be correct.

826 Senator Udall. Yes. Okay. I understand the continuous body--

827 Mr. Nickles. I could give you a longer answer--

828 Senator Udall. No, no. I don't need a longer answer--

829 [Laughter.]

830 Senator Udall. --because it is 11:15.

831 [Laughter.]

832 Mr. Nickles. I appreciate it.

833 Senator Udall. I wanted to try to see if I could get an answer from you directly,  
834 and I understand the continuous--not to cut you off and not to be impolite in any way.  
835 I want to let you leave at 11:15, as you agreed.

836 Mr. Nickles. I appreciate it. Thank you.

837 **OPENING STATEMENT OF SENATOR UDALL**



838 Senator Udall. Thank you.

839 Thank you, Chairman Schumer, very much. Before I ask the Vice President a  
840 couple of questions, I just want to say a few things. To me, today's hearing is not  
841 about examining the current use of the filibuster, but the abuse of the filibuster. We  
842 would not need to examine the filibuster if it were used sparingly and judiciously, as  
843 Senator Nickles talked about. Unfortunately, both parties in recent years have shown  
844 their willingness to use it as a tool of obstruction rather than a means to extend debate.

845 One of the main reasons I ran for the Senate is because I saw the world's  
846 greatest deliberative body turning into a graveyard of good ideas. After over a year of  
847 observing this body in action, or in many cases lack of action, it is clear that we are in  
848 danger of becoming just that.

849 Last month, this committee held its first hearing on the filibuster. It focused on  
850 the evolution of the filibuster throughout the history of the Senate. At that hearing,  
851 several of my senior colleagues on the other side of the aisle spoke about the need to  
852 preserve the filibuster in its current form. They argued that it is embedded in the  
853 Senate's tradition of unlimited debate, that any attempt to reform it is simply a  
854 short-sighted power grab by a frustrated majority.

855 But I believe my colleagues are missing the point. I had been speaking for  
856 months about reforming the Senate rules, not just the filibuster, to make this a better  
857 institution. I am not approaching this effort with disrespect for this body's traditions.  
858 I hope that by reforming our rules, we can restore some of the collegiality and

859 bipartisanship that our Founders intended for the Senate.

860           And let me make clear, I don't necessarily think that the current three-fifths  
861 requirement to achieve cloture is wrong. What is wrong is that only three current  
862 members of the Senate, Senator Byrd, Senator Inouye, and Senator Leahy, have had the  
863 opportunity to vote on Rule 22, which was last changed in 1975. What is truly wrong  
864 with our rules is that they have become entrenched against change, something our  
865 Founders never intended.

866           I am very happy, Vice President Mondale, to see you here today because you  
867 were one of the leaders of filibuster reform back in 1975, and I know you believe, as I  
868 do, that each Senate has the constitutional right to change its rules by a majority vote,  
869 and you state that very clearly in your testimony.

870           The Senate of 1975 thought that the filibuster was being abused, but the more  
871 recent Senates have demonstrated a whole new level of destruction, with Senators from  
872 both sides of the aisle increasingly using it as a weapon of partisan warfare. It is time  
873 to reform our rules, and as I have said many times, I will hold this view whether I am a  
874 member of the majority or the minority. There are many great traditions in this body  
875 that should be kept and respected, but stubbornly clinging to ineffective and  
876 unproductive procedures should not be one of them.

877           Now, Vice President Mondale--

878           Chairman Schumer. Great, and thank you, and now you may ask your question.

879           Senator Udall. Thank you, Senator Schumer. Thank you, Mr. Chairman.

880 Vice President Mondale, you heard Senator Nickles talk about the idea that any  
881 change in the filibuster is going to dramatically change the Senate, that the Senate is  
882 going to become like the House, and we heard this in our last hearing. Several critics  
883 of filibuster reform have stated that if the Senate changed the cloture rule, changed it in  
884 any way, it would make the Senate no different than the House of Representatives.

885 As a former member of this body, how would you respond to that assertion in  
886 terms of your experience that you went through and what you observe today with  
887 regard to the Senate?

888 Mr. Mondale. I don't want the Senate to become the House. I want it to be  
889 the unique body that it has always been.

890 Senator Udall. And I agree with you on that.

891 Mr. Mondale. When we adopted these rules in 1975 reducing the number  
892 needed for cloture, what we heard from the opposition was just that, that you are going  
893 to change the Senate away from what it has been, and now today what I am hearing is  
894 60 is just about right. Well, that is a transformation in viewpoint from what we heard  
895 back then.

896 The rules have changed since the beginning of this Senate. At first, there was  
897 no filibustering going on. Then they went to the--it was just move the previous  
898 question. Then there were several decades where there was no way of closing off  
899 debate. And then in the middle of World War I, when Wilson couldn't get the Senate  
900 to even supply materials to fight the war, he gave a bitter speech and the Senate bent

901 and adopted the two-thirds rule.

902 And then it came to our time and we were paralyzed. We couldn't get anything  
903 done unless everyone agreed to it. And so we changed the rule with a broad  
904 cross-section of support. Because of the rulings of Vice President Rockefeller, we  
905 changed the rules to what they are now, and I think that worked for us. It worked for  
906 us in those times. But what we have now is a harsh partisanship that scholars - I know  
907 they are going to testify later here - say that the situation now is, in terms of abuse of  
908 power, in terms of paralysis, is worse and different than it has ever been, and I believe  
909 that is true.

910 The number of filibusters that were cited in the charts shown before, the use of  
911 holds, which we haven't yet discussed today, it has been done before, but the  
912 pervasiveness of the strategy of holds now holds up hundreds of nominations. The  
913 government can't get going. On any number of measures, often the holds are  
914 submitted secretly. There are rolling holds, all kinds of holds now. And the net effect  
915 is that a few are able through secrecy to block the Senate from action without any  
916 public accountability, and they are able to do that because just behind that hold is the  
917 threat of a filibuster. And the leader knows he can't make any progress.

918 So I think that we need to adjust the rules, not to become the House, but to  
919 become a restored, effective Senate with the power to deliberate so we can do our jobs  
920 and do them better.

921 Senator Udall. Thank you very much. You said we haven't talked enough

922 about holds. I mean, one of the results of holds, and you know this, observing us  
923 currently, I believe it was the Washington Post reported that after the first year, the  
924 Obama administration had been in office for a year, they only had 55 percent--

925 Mr. Mondale. Right.

926 Senator Udall. --of their appointees in place. So basically you have the hold  
927 process holding up the administration from getting its team in place. That wasn't what  
928 was ever envisioned, I think, by our Founders or by the Constitution. It has been  
929 completely abused.

930 What would you suggest in terms of if you were going to make a rule change  
931 about holds, specifically? Could you talk to us a little bit about that?

932 Mr. Mondale. Yes. What I said in my testimony was that I think the Leader  
933 ought to be able to move to proceed, and it should be done with a majority vote, maybe  
934 with a certain time limit for the debate. But it shouldn't be, in effect, filibuster. And I  
935 am talking about how you get the measure up for consideration. I am not talking  
936 about how it is finally resolved. The regular rules would apply to that.

937 Senator Udall. Yes.

938 Mr. Mondale. Many times we have seen on these holds that they are held up,  
939 and then when it finally gets to a filibuster vote or a final vote on the nominee, they  
940 pass 98-to-two or something like that. So it was apparently a false issue.

941 Senator Udall. Thank you very much, and thank you for allowing me to run a  
942 little bit over there--

943 Chairman Schumer. It was well worth it.

944 Senator Udall. --actually with his answer. Thank you, Mr. Chairman.

945 Chairman Schumer. Senator Alexander?

946           Senator Alexander. Just to put all this in historical context, the Vice President's  
947 last example was exactly what happened to me in the spring of 1991 when Senator  
948 Metzenbaum held my nomination as Education Secretary up for three months and then  
949 finally I was confirmed at midnight by unanimous consent, you know, after I had waited  
950 around for about four months. I told the story at the earlier hearing, I went to see  
951 Warren Rudman and said, what do I do about this? He said, "Keep your mouth shut.  
952 You have no cards." And he told me the story of how Senator Durkin had held him up  
953 and he would withdraw his name and run against Durkin and beat him in 1976. So  
954 there is not so much new about these holds.

955           Mr. Vice President, this has been very helpful to have you here. Senator Udall  
956 was talking about his impressions as a new Senator. Mine was shock at the  
957 filibustering of Judge Pryor, who had clerked for Judge Wisdom in New Orleans, for  
958 whom I had clerked, Judge Pickering, who had been a civil rights advocate in Mississippi  
959 when it was unpopular, Miguel Estrada, and Priscilla Owen. Do you think it was wrong  
960 for the Democratic minority to filibuster President Bush's judicial nominees when he  
961 was President?

962           Mr. Mondale. What we are getting at here is whether we are all taking  
963 situational, tactical positions on the rules – that is using them when it serves our  
964 purposes and opposing it when it doesn't.

965           Senator Alexander. Right.

966           Mr. Mondale. My view is you have to live by these rules. They were

967 bipartisan. We put them in place. I hope they can be bipartisan if there are any  
968 changes now. And I don't see anything in the rules that says that you can't filibuster a  
969 nominee as well as a regular measure.

970 Senator Alexander. Thank you for that. There had been a precedent, of  
971 course, of not doing that. Justice Scalia--well, we won't go into all of that, but it was a  
972 big, big change. And when we Republicans, and I was one really on the other side of  
973 this issue with the Gang of 14 movement, when many Republicans tried to change the  
974 rules and assert the argument you are now making, the constitutional argument,  
975 Senator Reid said it would be the nuclear option. It would be the end of the Senate as  
976 we know it and it was going to be Armageddon.

977 Let me go back to my earlier point about the hold that Senator Metzenbaum put  
978 on me. You mentioned Senator Allen.

979 Mr. Mondale. Yes.

980 Senator Alexander. And you remember when you were first elected, Senator  
981 Williams from Delaware, who would sit on the front row and had this high voice. We  
982 have always had, at least in my experience here of watching the Senate and serving in it,  
983 individual Senators who have exercised these rules, and we have them today.

984 I mean, if you will remember in the 1980s, Senator Byrd and Senator Baker  
985 operated the Senate on the sort of handshake that Senator Nickles talked about. They  
986 had these, I guess you would call them broad agreements on every bill that came up,  
987 that we would bring up the X bill, the financial regulation bill, and we will have 35



988 amendments on it, or 36, 18 here and 18 here, and then we will vote, and that is how  
989 almost all business was done. Of course, it can't be done if one Senator objects, which  
990 may be the reason we don't have that kind of thing today.

991 So I am going to ask you a question and this will be my last one. It seems to me  
992 that changing the 60 would only make less likely bipartisanship, because when the  
993 Democrats have had 60 in the last year and a half, they paid no attention to the  
994 Republicans and they have just jammed their own legislation through, in my judgment.  
995 When they get fewer, they will have to pay attention to us, or we are in the majority  
996 and you have fewer, we will have to pay attention to you, and that produces  
997 compromise and bipartisanship, I believe.

998 But maybe there is a different way to deal with the question of the individual  
999 Senator who puts on too many holds or holds up things for too long without changing  
1000 the 60. I mean, is there a solution for a Senator who the rest of the Senators think is  
1001 taking advantage of the rules and making it impossible for the Senate to operate under  
1002 the kind of broad agreements that Senator Byrd and Senator Baker once used to  
1003 manage the flow of the Senate?

1004 Mr. Mondale. I think one of the things that many Senators have tried to do is  
1005 make these holds public so the holder must explain to his colleagues and to his  
1006 constituents why he is doing it. As you know, there is a rule here now that if you put  
1007 on a hold for longer than six days, the name will be disclosed, and so now there is a  
1008 strategy for rolling the hold so that every fifth day, the name of the holder changes. So

1009 it has frustrated the disclosure. If there would be some way to guarantee public  
1010 disclosure immediately, that might help.

1011 But there is nothing in the rules about holds. There has never been a Senate  
1012 decision. But it is now not a minor problem, it is a pervasive problem, and every  
1013 leader, Republican leader and Democratic leader, has at one time in his career stood up  
1014 and lamented what holds have done to his ability to conduct a sensible Senate. I think  
1015 we need to deal with holds, because it is now a much bigger problem and it is a growing  
1016 problem because it works, it is secret, it is effortless, and it is, I think, very destructive of  
1017 the purposes of the Senate.

1018 Chairman Schumer. Thank you, Mr. Vice President.

1019 Senator Alexander. Thank you, Mr. Chairman.

1020 Chairman Schumer. Thank you, Senator Alexander.

1021 Now, we had asked unanimous consent at the beginning of this hearing that  
1022 when Senator Byrd arrived if he could make his opening statement. I don't believe he  
1023 will ask questions. So with everyone's permission, he has been waiting for a couple of  
1024 minutes, I would like to call on Senator Byrd to make his opening statement.

1025 Senator Roberts will ask questions and you will be on your way, but it has been  
1026 really helpful for you to be here today.

1027 [Pause.]

1028 Chairman Schumer. Thank you for being here, Senator Byrd. I think I join  
1029 everyone here - Senators, Vice President Mondale, and the audience - in really thanking

1030 Senator Byrd for going out of his way to be here.

1031 Senator, your name has come up on many, many occasions in this hearing and  
1032 how you were so instrumental in what happened and in forging the compromise in 1975  
1033 and in many other ways. We are honored you are here. I know it will be a token, not  
1034 just to the attendees here but to this committee and the whole Senate, of how  
1035 important you think this subject is. So thank you, and the floor is yours.

1036 **OPENING STATEMENT OF SENATOR BYRD**

1037 Senator Byrd. Thank you. Mr. Chairman, in his 1789 journal, Senator William  
1038 Maclay wrote, and I quote, "I gave my opinion in plain language that the confidence of  
1039 the people was departing from us owing to our unreasonable delays. The design of the  
1040 Virginians and of the South Carolina gentlemen was to talk away the time, so that we  
1041 could not get the bill passed."

1042 Our Founding Fathers intended the Senate to be a continuing body that allows  
1043 for open and unlimited debate and the protection of minority rights.

1044 Senators have understood this since the Senate first convened. James Madison  
1045 recorded that the ends to be served by the Senate were, "first, to protect the people  
1046 against their rulers, secondly, to protect the people against the transient impressions  
1047 into which they themselves might be led." A necessary fence against such danger  
1048 would be the United States Senate.

1049 The right to filibuster anchors this necessary fence. But it is not a right intended  
1050 to be abused.

1051           During this 111th Congress, in particular, the minority has threatened to  
1052 filibuster almost every matter proposed for Senate consideration. I find this tactic  
1053 contrary to every Senator's duty to act in good faith.

1054           I share the profound frustration of my constituents and colleagues as we  
1055 confront this situation. The challenges before our nation are too grave, too numerous,  
1056 for the Senate to be rendered impotent to address them, and yet be derided for  
1057 inaction by those causing the delays.

1058           There are many suggestions as to what we should do. I know what we must  
1059 not do.

1060           We must never, ever, ever, ever tear down the only wall, the necessary fence,  
1061 that this nation has against the excesses of the executive branch and the resultant haste  
1062 and tyranny of the majority.

1063           The path to solving our problem lies in thoroughly understanding the problem.  
1064 Does the difficulty reside in the construction of our rules, or does it reside in the ease of  
1065 circumventing them?

1066           A true filibuster is a fight, not a threat, not a bluff. For most of the Senate's  
1067 history, Senators motivated to extend debate had to hold the floor as long as they were  
1068 physically able. The Senate was either persuaded by the strength of their arguments  
1069 or unconvinced by either their commitment or their stamina. True filibusters were,  
1070 therefore, less frequent, and more commonly discouraged, due to every Senator's  
1071 understanding that such undertakings required grueling, grueling personal sacrifice,

1072 exhausting preparation, and a willingness to be criticized for disrupting the nation's  
1073 business.

1074           Now, unbelievably, just the whisper of opposition brings the “world's greatest  
1075 deliberative body” to a grinding halt. Why is that? Because this once highly  
1076 respected institution has become overwhelmingly consumed by a fixation with money  
1077 and media.

1078           Gone, gone are the days when Senators Richard Russell and Lyndon Johnson,  
1079 and Speaker Sam Rayburn gathered routinely for working weekends and couldn't wait  
1080 to get back to their chambers on Monday morning.

1081           Now, every Senator spends hours every day throughout the year and every year  
1082 raising funds for reelection and appearing before cameras and microphones. Now, the  
1083 Senate works three-day weeks, with frequent and extended recess periods.

1084           Forceful confrontation to a threat to filibuster is undoubtedly the antidote to the  
1085 malady. Most recently, Senate Majority Leader Reid announced that the Senate would  
1086 stay in session around the clock to bring financial reform legislation before the Senate.  
1087 As preparations were made and the cots were rolled out, a deal was struck and the  
1088 threat of filibuster was withdrawn.

1089           I strongly commend the Majority Leader for this progress, and I strongly caution  
1090 my colleagues, as some propose to alter the rules to severely limit the ability of a  
1091 minority to conduct a filibuster. I know what it is to be Majority Leader and wake up  
1092 on a Wednesday morning in November, and find yourself a minority leader.

1093 [Laughter.]

1094 Senator Byrd. I also know that current Senate rules provide the means to break  
1095 a filibuster. I employed them myself in 1977 to end the post-cloture filibuster on  
1096 natural gas deregulation legislation. This was the roughest filibuster I have  
1097 experienced during my more than 50 years in the Senate.

1098 In 1987, I successfully used Rules 7 and 8 to make a non-debatable motion to  
1099 proceed during the morning hour. No leader has attempted this technique since, but  
1100 this procedure could be and it should be used.

1101 Over the years, I have proposed a variety of improvements to Senate rules to  
1102 achieve a more sensible balance allowing the majority to function while still protecting  
1103 minority rights. I have supported eliminating debate on the motion to proceed to a  
1104 matter (except for changes to the Senate rules), or limiting debate to a reasonable  
1105 time on such motions, with Senators retaining the right to unlimited debate on the  
1106 matter once it was before the Senate. I have authored several other proposals in the  
1107 past, and I look forward to our committee work ahead as we carefully examine other  
1108 suggested changes. The committee must, however, jealously guard against efforts to  
1109 change or reinterpret the Senate rules by a simple majority, by circumventing Rule 22,  
1110 where a two-thirds majority is required.

1111 As I said before, the Senate has been the last fortress of minority rights and  
1112 freedom of speech in this republic for more than two centuries. I pray that Senators  
1113 will pause and reflect long before ignoring that history and tradition.

1114 Chairman Schumer. Well, thank you so much, Senator Byrd. First, I think for  
1115 all of us, we are privileged to be here and hear your testimony. Anyone who is sitting  
1116 here knows why Senator Byrd is revered in the Senate just by listening to him for the  
1117 last 15 minutes, where in his own inimitable style, he made powerful, practical, and  
1118 traditional arguments. I don't think need permission, and I am going to take the liberty  
1119 of distributing your remarks to every member of the Senate.

1120 Senator Byrd. Thank you, Mr. Chairman. Thank you very much.

1121 Mr. Mondale. Mr. Chairman?

1122 Chairman Schumer. Vice President, please.

1123 Mr. Mondale. It was my privilege to serve with Senator Byrd when he was  
1124 Minority and Majority Leader, to be Vice President presiding when we had some fairly  
1125 rigorous tests of the rules--

1126 Senator Byrd. You bet.

1127 [Laughter.]

1128 Mr. Mondale. --and I came to deeply admire his understanding and his  
1129 statesmanlike approach to these rules. Most of the rules that did reform the Senate,  
1130 he himself wrote. They are the Byrd Rules, and it is an honor to hear from the Senator  
1131 again today.

1132 Chairman Schumer. Thank you, Mr. Vice President. It is really one of those  
1133 moments in the Senate, I think, that many of us will just not forget.

1134 Thank you, Senator Byrd. Thank you so much.

1135           Senator Byrd. Thank you. Thank you, Mr. Chairman. I thank the committee,  
1136 and I thank the Vice President.

1137           Chairman Schumer. Thank you, Senator. That was great.

1138           I just want to say, as Senator Byrd leaves, that we forget the traditions of the  
1139 Senate in this rushed, sometimes partisan, angry world, and he brings us right back to it.  
1140 This really was, in my opinion, and I think and hope I am not--I don't think I am  
1141 overstating it, sort of a hallowed moment.

1142           Senator Roberts, you may resume questioning of Vice President Mondale.

1143           Senator Roberts. That is a pretty tough act to follow, to say the least. I recall  
1144 when we first went to Great Britain on an interparliamentary exchange led by Ted  
1145 Stevens, thinking that he could work things out better on the Appropriations Committee  
1146 with Senator Byrd if we took him over to Great Britain, and I can't remember which Brit  
1147 gave the opening speech, but it indicated that he wanted to welcome those of us from  
1148 the colonies who obviously did not understand all of the intricacies of the mother  
1149 country, but that we were certainly welcome. I leaned over to the British fellow to my  
1150 left and said, he will regret those remarks for the rest of his life--

1151           [Laughter.]

1152           Senator Roberts. --because it was Senator Byrd who responded and then  
1153 instructed all those present on the reign of virtually every King of England--and queen,  
1154 and the politics behind it.

1155           [Laughter.]



1156 Senator Roberts. Two hours later, the guy sitting next to me said, "I say, is he  
1157 going to continue through every one of them?"

1158 [Laughter.]

1159 Senator Roberts. And I said, yes, he is, and he did.

1160 [Laughter.]

1161 Senator Roberts. That was signature Bob Byrd, who also enthralled us during  
1162 the entire trip with a lot of other stories.

1163 Tom indicated that he was worried as a new Senator about coming to the  
1164 graveyard of good ideas. Some feel--actually, I feel there is a growing number that  
1165 might say that some of these ideas are bad ideas that deserve a decent burial. I think  
1166 it is very important to pass legislation. I think that is probably why we are created, the  
1167 House, the Senate. But it is just as important to prevent bad legislation from passing.

1168 I kept telling Max Baucus and Chuck Grassley on the Finance Committee, Mr.  
1169 Vice President, that we ought to have a flashing light, "Do no harm," every time we  
1170 considered a myriad of amendments that obviously not many people knew a lot about,  
1171 with the exception of our Chairman.

1172 At any rate, I stand in admiration of Senator Byrd and his fierce, fierce fight for  
1173 the rights of the minority, and also in regards to the executive branch. I think the  
1174 elephant in the room here as to why we have so many problems, or challenges, really, I  
1175 don't want to call them problems, is that the executive branch obviously has a  
1176 tremendous agenda. I don't know whether to compare it to the New Deal or the Great

1177 Society or whatever has been said by the knowing pundits that will testify here, but my  
1178 goodness, I cannot think of any endeavor that affects any person's interest in the  
1179 country that has not been touched by legislative efforts under the banner of change.

1180 I think if you looked at the primaries, and we have the expert on primaries here  
1181 to my right, who is a dear, dear friend, but I think that there has been an obvious  
1182 reaction with regards to debt and spending and government takeovers and jobs and  
1183 terrorist policy, et cetera, et cetera. And I say that because I think that that is the  
1184 push, and Senator Byrd mentioned the executive that is coming down the pike and it is a  
1185 lot like a fire hose. If it isn't legislative, it is done by Executive Order and you read  
1186 about it on page 11 of some newspaper, if you read newspapers anymore, and it is a  
1187 pretty shocking kind of thing to you. You say, oh, wait a minute. I would like to grab  
1188 onto that and get it back to committee, but we don't go to committee anymore.

1189 We bypass committees, and I think that is one of the things that Senator Nickles  
1190 brought up and I am sure the Vice President agrees. You have got to go to  
1191 committees, where the expertise is, and then hopefully avoid the appropriators trying to  
1192 change it and then reach some accommodation and that is how it worked. But that is  
1193 not how it is working now, because we are leapfrogging the committees on very, very  
1194 important ideas that Tom has mentioned over there in his comments.

1195 I want to talk about holds just a minute. I put holds on people. I don't like it  
1196 at all. When I do so, I do it publicly. But I was stuck with a situation where there  
1197 were many reports, and I believed that they had legs, where we were going to transfer

1198 those in Gitmo up to Fort Leavenworth where we had the Command and Staff School,  
1199 and it is the intellectual center of the Army. That is where General Petraeus wrote the  
1200 doctrine that is in evidence today with Afghanistan, hopefully that will be successful.

1201 We have inside-out security, but we don't have outside-in, and I thought the  
1202 suggestion was ludicrous. I tried with the White House, with the Department of  
1203 Defense, with the National Security Council, with DOD, even the CIA, to figure out, is this  
1204 really going to happen? Is there any possibility of this happening? And then finally I  
1205 couldn't get any assurance, so I just put a--I said, I want assurance from the White  
1206 House that this is not going to happen, and so I put a hold on the Secretary of the Army,  
1207 who happened to be a very good friend of mine, a Republican Congressman replacing  
1208 Pete Sessions, who was also a very good friend of mine.

1209 At any rate, he called me and he said, "Why do you have a hold on me?" And I  
1210 said, well, you are a great friend. I just thought I would pick you out and give you a  
1211 little publicity. And he said, "Well, what is the problem?" I said, I don't have any  
1212 problem with you, John. It is just I am trying to get an answer from somebody to  
1213 indicate to me where we are in regards to moving incarcerated terrorists to  
1214 Leavenworth, Kansas.

1215 Well, I finally got what I needed, and I can't talk about it because it was all  
1216 confidential, and right now, that whole policy, I think, is sitting over there at the Justice  
1217 Department somewhere being decided. But that was a case where I thought at least a  
1218 hold was justified. I am not talking about holds that will last forever to hold up the

1219 progress of the Senate. That did hold up the situation with the Secretary of the Army.  
1220 I know the head of DOD, Mr. Gates, who is from Kansas, certainly let me know how he  
1221 felt about it.

1222 I have always felt, I would tell the Chairman, that I didn't want any amendment  
1223 that I would like to offer up to be debated on the floor of the Senate. I didn't even  
1224 want it debated in the committee. I thought if I didn't have enough merit in the  
1225 amendment to talk to somebody on the other side, regardless of who is in power on the  
1226 committee, to put it in the Manager's Amendment or just agree by unanimous consent,  
1227 that I probably didn't have too much business offering the amendment, and I certainly  
1228 didn't want a vote on the Senate floor, where a vote could go the other way and then  
1229 that puts it in cement and then you have lost the issue. I know there are those  
1230 Senators who would rather have the debate and lose than they would make any  
1231 progress with the amendment. So that is just my school of thought.

1232 I think we do reach agreements, as Senator Nickles has indicated, when the  
1233 rubber meets the road. We did during impeachment. We all met in the Old Senate  
1234 Chamber and individuals came together and we worked a way out of a very difficult  
1235 situation.

1236 I don't know when we are going to meet like that again to reach some kind of  
1237 accommodation with what we have facing us, which I say is a very ambitious agenda in a  
1238 Senate and a country that is very Balkanized in regards to the response to all of that. I  
1239 suspect it will come finally during the time of entitlement reform, which we must tackle,

1240 and our economic situation, and I think we are just going to have to sit down and say, all  
1241 right, we have to do this regardless of the press, as the Senator has indicated, or  
1242 elections or anything else. We will have no alternative. And I hope that would be  
1243 rather a gloomy prospect if that is the only thing that can really bring us together. But  
1244 I would hope that we could do what Senator Nickles has pointed out and also what the  
1245 Vice President has pointed out.

1246 I am way over time, Mr. Chairman. Thank you.

1247 Chairman Schumer. Thank you. It is always a pleasure to listen to Senator  
1248 Roberts. He didn't talk about each King of England, but he had a lot of wisdom in what  
1249 he had to say.

1250 [Laughter.]

1251 Chairman Schumer. Vice President, thank you so much.

1252 Mr. Mondale. Thank you.

1253 Chairman Schumer. As Tom Udall went out, his hat was off to you and how you  
1254 have really helped us in this debate.

1255 Mr. Mondale. Thank you.

1256 Chairman Schumer. So your generous donation, in a sense, of your time, but  
1257 more importantly of your thinking, is going to help us, and certainly I will be continuing  
1258 to consult you as we move forward here.

1259 Mr. Mondale. Thank you very much.

1260 Chairman Schumer. Thank you, Mr. Vice President. Thank you.

1261 Let us call our next panel, and I appreciate their understanding. I am going to  
1262 give brief introductions because we are running a little late. We have a great panel  
1263 here and let me just quickly do the introductions of our two witnesses.

1264 Steven Smith is a Professor of Social Sciences at Washington University and  
1265 Director of the Weidenbaum Center on the Economy, Government, and Public Policy  
1266 there. He is the author of several books on the U.S. Congress, including "Politics or  
1267 Principle?", which is about the filibuster. He is a former fellow of the Brookings  
1268 Institute.

1269 Norm Ornstein is a name well known to every one of us here. He is a resident  
1270 scholar of the American Enterprise Institute. He also serves as Co-Director of the  
1271 Election Reform Project and is the author of many books about Congress, including "The  
1272 Broken Branch." He writes a weekly column for Roll Call, is an election analyst for CBS  
1273 News, and is counselor to the Continuity of Government Commission.

1274 Gentlemen, each of your statements will be read into the record, and if you  
1275 could keep your testimony to the allotted time, which I am sure you will, that would be  
1276 great.

1277 Professor Smith?

1278 **STATEMENT OF STEVEN S. SMITH, DIRECTOR, THE MURRAY WEIDENBAUM CENTER ON**  
1279 **THE ECONOMY, GOVERNMENT, AND PUBLIC POLICY, KATE M. GREGG PROFESSOR OF**  
1280 **SOCIAL SCIENCES, AND PROFESSOR OF POLITICAL SCIENCE, WASHINGTON**  
1281 **UNIVERSITY, ST. LOUIS, MISSOURI**

1282           Mr. Smith. Thank you, Mr. Chairman and Senator Bennett. This is a very  
1283 important set of hearings. The Senate is, I think, at an important juncture in its history  
1284 and the upshot of my testimony is that we actually have reached a point in the Senate  
1285 that is qualitatively different than the Senate has been in at any time in its past and it is  
1286 time to consider some changes, both in the rules and in how the parties and Senators  
1287 behave.

1288           My general argument is that one of the important roles of the Senate is to serve  
1289 as a policy incubator, that is, for Senators to use their time and creativity to define and  
1290 address the important problems of the country. But the Senate in the last ten years  
1291 and especially in the last five years or so has reached a point where the Senate's most  
1292 valuable resources, the time and creativity of its members, is undercut by how the  
1293 Senate has come to operate.

1294           As we have seen throughout the hearing and as the two of you know perfectly  
1295 well, the more vigorous exploitation of minority rights and the majority response has  
1296 had a very pervasive effect, and I think a negative effect, on how the Senate is operated.  
1297 Here is what I see.

1298           In recent Congresses with both Democratic and Republican minorities, very few  
1299 major measures have been untouched by efforts to delay or prevent action. I have  
1300 some tables at the end of my testimony that you can take a look at. The minority has  
1301 engaged in more silence in response to majority requests for clearance of bills for  
1302 consideration. There have been more frequent objections to majority party

1303 unanimous consent requests to structure debate and amendments. There are more  
1304 holds extended to more minor measures and nominations, something for an outsider  
1305 very difficult to count, but plainly true. There are more delays of Senators, and  
1306 sometimes, I think, deliberately minority party Senators to get to the floor to offer  
1307 amendments. And even an increase in the number of minority party unanimous  
1308 consent requests to try to restructure floor debate as they see fit.

1309         Now, the minority's moves have motivated majority party leaders to leave  
1310 nothing to chance. In kind of a tit for tat fashion, in kind of a parliamentary arms race  
1311 fashion, over the years, the majority, indeed, has responded, just as we heard this  
1312 morning from a variety of Senators on the Republican side. Beyond having a quick  
1313 trigger on filing for cloture, Majority Leaders and bill managers of both parties have  
1314 more frequently filled the amendment tree, more frequently used their own  
1315 amendments to prevent other amendments from becoming the pending business, a  
1316 tactic which became an especially sensitive matter just yesterday when the minority  
1317 took advantage of the fact that a pending amendment prevents another amendment  
1318 from being considered except by unanimous consent.

1319         This has led to tightened unanimous consent agreements, including the use of  
1320 60-vote requirements for amendments, which is a relatively new development. And  
1321 beyond the obvious things on the floor, it has moved Majority Leaders to take a closer  
1322 look at non-conference mechanisms to avoid debatable conference motions. And on  
1323 some sensitive matters, especially on appropriations bills, Majority Leaders have



1324 avoided floor action altogether by facilitating the creation of omnibus bills in conference  
1325 to limit the number of shots at the bills once they get to the floor.

1326           Now, this is not the kind of Senate that I heard anyone here wanting in the  
1327 future. This is a question of the power of the Senate. What kind of a Senate is it that  
1328 fails, because of the desire to avoid floor delay and obstruction, what kind of a Senate is  
1329 it that fails to even consider appropriations bills that are the foundation of the power of  
1330 the purse of the Congress in dealing with the executive branch?

1331           Now, of course, the minority has not remained idle. The minority's  
1332 countermeasures include more objections to unanimous consent requests, frequently  
1333 more resolutely opposing cloture on bills. There have been any number of instances in  
1334 which a Senator in the minority has said, because I can't get my amendment up, I am  
1335 going to vote against cloture. So in this context, procedural prerogatives intended to  
1336 protect an open, deliberative, flexible process has, in fact, generated in practice a  
1337 complicated process that is often rigid and procedure-bound.

1338           Now, the best metaphor for this, I think, is actually a medical one. It is really a  
1339 syndrome, kind of an obstruct and restrict syndrome, one in which well-justified  
1340 procedural moves on each side accumulate and harm the institution.

1341           Each party now begins with the working hypothesis that the other side will fully  
1342 exploit its procedural options, and so it must fully deploy its without any evidence from  
1343 the other side that it is using its procedural options to harm its interests. Now, this can  
1344 hardly be argued to be the kind of Senate in which every Senator gets an opportunity to

1345 fully explore new policy ideas. It is, in fact, a Senate that over the last decade or so has  
1346 managed to radically reduce the incentives for individual Senators to take the time and  
1347 to apply the creativity to address the nation's problems.

1348 My second major point is that this is a role that the Senate should focus on.  
1349 We are a country with immense problems. Senators of both sides have argued for  
1350 years that many of these problems have gone unaddressed. Part of it is in our larger  
1351 system of government, the checks and balances, divided party control of the House and  
1352 the Senate and the Presidency and so on, but a large part of it rests right here in the  
1353 Senate.

1354 The constitutional features of the Senate that encourage this, of course, were  
1355 the longer terms, the overlapping terms, the continuity of the Senate. All of this gave  
1356 the Senate a special place for the application of creativity in addressing new ideas,  
1357 building a national constituency for new ideas, and so on. Much of that has now been  
1358 undercut by the system we have.

1359 I favor a system where we reach a new balance. It is unfortunate, but we can't  
1360 reverse history. We can't really expect the parties to unilaterally disarm. I think it is  
1361 up to the Senate to figure out a few new ways to limit debate and at the same time  
1362 protect minority rights that are currently being threatened by this awful obstruct and  
1363 restrict syndrome.

1364 [The prepared statement of Mr. Smith submitted for the record]

1365 Mr. Smith. Thank you, Professor Smith.

1366 Mr. Ornstein?

1367 **STATEMENT OF NORMAN J. ORNSTEIN, RESIDENT SCHOLAR, AMERICAN ENTERPRISE**

1368 **INSTITUTE FOR PUBLIC POLICY RESEARCH, WASHINGTON, D.C.**

1369 Mr. Ornstein. Thanks, Mr. Chairman. It is a particular pleasure to testify in  
1370 front of you and in front of this committee, which is filled with people who really do  
1371 care about the Senate and its role in the American democratic process. I am  
1372 particularly grateful that it does not require a motion to proceed for me to move on to  
1373 my testimony or we might be here all week.

1374 Let me start by saying that I am really not among those who want to end Rule  
1375 22. I don't want the Senate to become like the House. I actually think that the  
1376 Senate has become more like the House, in part because so many House members,  
1377 especially the Class of 1994 and classes that have followed, have gravitated over here  
1378 and have brought some of the norms of a harshly partisan, deeply divided, and perhaps  
1379 ultra-efficient House into the Senate DNA a little bit more than they should have.

1380 As I listened to the testimony and as I watched the testimony from the last  
1381 hearing--by the way, I want to commend the committee, more than any other, the  
1382 ability for somebody to be able to go to your website and watch what you do and see,  
1383 by the way, how carefully it is done is just a Godsend for those of us who follow  
1384 Congress.

1385 But I have had some sympathy with both sides in this. We do have a chicken  
1386 and egg problem, as Steve has said. This is a problem for the majority and the minority

1387 in a lot of ways, and it is a problem of the culture. And it is, as Senator Byrd so  
1388 eloquently said, in some respects a problem of the larger political culture, the outside  
1389 moving and infecting the inside, and some of that outside culture is particularly  
1390 obnoxious at this particular point. But we can't change the culture entirely inside the  
1391 Senate and we need to also focus to some degree on the rules. And hopefully, we can  
1392 find ways to change the norms and the rules together.

1393 I am not going to spend a lot of time because of the substance of this hearing on  
1394 specific recommendations, although I am very happy, and both of us, along with other  
1395 scholars who follow this process closely, have lots of ideas about specific things to do.  
1396 But I want to mention--

1397 Chairman Schumer. I would just ask, either of our witnesses here, if they would  
1398 like to offer suggestion. But, we are not up to specific suggestions yet.

1399 Mr. Ornstein. Yes.

1400 Chairman Schumer. But if you would, it would be really helpful to us if you  
1401 want to submit in writing some specific suggestions and we would add them to the  
1402 record. Then we might have you back again to ask questions about your suggestions, if  
1403 that would be okay.

1404 Mr. Ornstein. I think both of us would be delighted to do so--

1405 Chairman Schumer. Thank you.

1406 Mr. Ornstein. --and, of course, to work with the committee in any way that we  
1407 can to help to move this process forward.

1408 I want to talk about a couple of elements that I think are a focal point of this  
1409 hearing which really are what all this has done to the fabric of governance in America.

1410 I had great sympathy for Senator Alexander when he was held--his nomination  
1411 for Secretary of Education was held by Senator Metzenbaum. Steve Smith turned to  
1412 me at that particular moment and said, well, we have 100 Metzenbaums now. And  
1413 one of the problems is that nominations that are held for three months, or in many  
1414 cases six months, nine months, a year, or more, many leaving nominees to twist in the  
1415 wind, have an enormous human cost for those individuals. I have sympathy for  
1416 Senator Roberts, having a really serious concern and wanting to get the attention of the  
1417 executive branch and held up Congressman McHugh, which was painful to Congressman  
1418 McHugh.

1419 But Congressman McHugh was already here in Washington, had a job, had a  
1420 house. Imagine people who make a commitment to public service and are living  
1421 outside the city, as most of them do, thankfully, and we leave them twisting in the wind.  
1422 I think individual Senators often do not recognize the human cost to people. They  
1423 can't move their families. They can't time school years. We are losing a lot of good  
1424 people, and at the same time, we are finding agencies, critical agencies, that are left  
1425 headless or without the main people who are designed to run things, career civil  
1426 servants waiting for direction and can't get them.

1427 I can tell you from what I have heard from local officials out in the country that  
1428 one of the main problems we had in getting the stimulus package actually out there to

1429 have a more immediate and vibrant effect on the economy was that you had to  
1430 expedite action through waivers of things like Environmental Impact Statements, or to  
1431 move things more quickly than the normal process, and they couldn't do it because the  
1432 officials were not in place.

1433         At the same time, one of the great difficulties that we have is it is wonderful to  
1434 have a tradition of unlimited debate and unlimited amendments. We are not in the  
1435 19th century. There is a huge agenda. Whether you like some elements of that  
1436 agenda or not, the regular business of having authorizations done for programs and  
1437 agencies, of having appropriations, is a necessary component for good governance.  
1438 Whether you are a big government liberal or a small government conservative, the  
1439 government that we have to protect the integrity of the country, to protect our citizens,  
1440 ought to be run effectively and well.

1441         We have gone for years in many cases without programs being authorized, and  
1442 that hurts the implementation of those programs. Talk to any civil servant or  
1443 government official trying to administer a program when you don't know what your  
1444 appropriation is going to be, or you have to operate for months on a continuing  
1445 resolution and then all of a sudden get a flood of money coming in. It is no way to run  
1446 a government. Now, that is not entirely attributable to the way that the Senate is  
1447 operating, but in fact, we have been forced because of the way the system has become  
1448 clogged to move away from the regular order in too many ways.

1449         The human cost is there for judges, as well. I must say, Senator Bennett, you

1450 are absolutely right that we did not have a tradition of filibustering nominees, although  
1451 we did have filibusters before, including Justice Fortas. But not to get into that  
1452 argument, what did change long before we had a discussion of filibusters of judicial  
1453 nominees was an increasing practice of holding up nominations to try and keep slots  
1454 open from one administration to the next, and that was a dramatic change from what  
1455 we had had before.

1456 And we have large numbers of judicial nominees, Elena Kagan among them, who  
1457 sat for long periods of time when there were no objections to their individual  
1458 qualifications--this was true for both parties--many of whom ultimately withdrew. Just  
1459 as for executive branch officials, if you are in a law firm or in a university and you are  
1460 waiting to take a leave or trying to leave your firm, you are left in limbo. It is no way to  
1461 run things.

1462 Frankly, I can make a better case for filibustering lifetime appointments than I  
1463 can for filibustering temporary appointments for any period of time, but in either case,  
1464 we are not considering the human cost.

1465 There are ways to deal with these things, and the hold itself and the way it has  
1466 exploded as a tactic for holding up hundreds and hundreds, not individual nominees,  
1467 many of whom--most of whom now are not held up because of their qualifications or  
1468 concerns but as hostages, and some for the purpose of killing them, can be changed.  
1469 The notion of filibusters on motions to proceed moves away from any argument about  
1470 trying to cut off debate because, in fact, that is an attempt itself to cut off debate. And

1471 if we took Senator Schumer's chart and parsed it out, you would find an increasing  
1472 number of the cloture motions are on motions to proceed.

1473 And finally, let me say, if we talk about the numbers, one very simple change to  
1474 consider, remember in 1975 we went from two-thirds of the Senate--or, excuse me,  
1475 from two-thirds of the Senate present and voting to three-fifths of the Senate--would be  
1476 to simply move to three-fifths of the Senate present and voting. One of the real  
1477 problems you have got now is if somebody is sick, as we saw with Senator Byrd, one  
1478 individual can create an enormous roadblock if you have a rigid number. So there is a  
1479 way to preserve the number 60 but to create a little bit more flexibility. And then  
1480 there are other ways to make sure that we can expedite action while preserving the  
1481 right of a minority and the right of other members to offer amendments and have  
1482 debate.

1483 [The prepared statement of Mr. Ornstein submitted for the record]

1484 Chairman Schumer. Thank you, Mr. Ornstein. I thank both our witnesses for  
1485 excellent testimony.

1486 We are running much later than we thought, but I do have one question. I have  
1487 a whole lot of questions. I am going to submit some in writing.

1488 The debate that some of us have been focusing on is - is it the Constitution that  
1489 trumps the rule in Rule 22? But Senator Nickles had something interesting to say, and  
1490 Senator Bennett and I were chatting here. It really is a 'chicken and egg', I think, as I  
1491 think it was you, Professor Smith, said. We say, the majority Democrats at this



1492 moment say, you are filibustering to delay. The minority Republicans say, we are  
1493 filibustering because you won't let us offer amendments.

1494 And, it was always sort of in my mind a tradeoff, having moved from the House  
1495 to the Senate, that I thought, 'well, that is the tradeoff.' The majority sets the agenda  
1496 and the minority gets to offer amendments, not just to that agenda but other things. It  
1497 seemed to me sort of a balanced system. In a sense, when I moved from the House to  
1498 the Senate, I said it is harder in the Senate because you have to vote on all kinds of  
1499 things, and you don't have the Rules Committee when you are in the majority. I have  
1500 served minority House, majority House, minority Senate, majority Senate. Only one is  
1501 really bad.

1502 [Laughter.]

1503 Chairman Schumer. So there was that sort of balance, and it is sort of taken  
1504 out of the way. Now, I could argue with Senator Bennett that holds on nominees are  
1505 not intended to prevent debate and amendment but just intended to be dilatory.  
1506 Motions to proceed are somewhat different.

1507 But my question, and I will only ask one here, although I am interested in your  
1508 views, and I will ask you in writing, on the Constitution versus Rule 22, is this. Do you  
1509 think there is some hope? Senator Nickles said, don't change the rules. Try to come  
1510 to some bipartisan agreement, you know, agreement between the caucuses, I think he  
1511 called it.

1512 Do you think that is possible in this day and age, where the majority would say to

1513 the minority, we are going to ensure your right to offer several amendments, or a bunch  
1514 of amendments, not to be dilatory, not to take over. It would be unfair, it seems to me,  
1515 for the minority to spend more time on their amendments that are not relevant to the  
1516 bill than the majority spends on the bill itself. That would take away the power to set  
1517 the agenda. But we will guarantee you your right to offer some non-germane  
1518 amendments, but in return, you don't slow things down unnecessarily.

1519 I don't know, maybe that tradeoff could work, especially given the fact that each  
1520 of us realizes we may be on the other side, majority-minority, several times in our  
1521 career, as has happened to me. So that is my only question. I would ask each witness  
1522 to give an answer, and then we will call on Senator Bennett and let people go.

1523 Mr. Smith. Senator Schumer, I certainly favor some kind of a mixed package  
1524 that, on the one hand, limits debate at least on some motions, the motion to proceed.  
1525 I would like to see some limits on motions to go to conference. I would even like to  
1526 see limits on debate on amendments, which would have the effect of guaranteeing the  
1527 minority a vote on an amendment that is taken up on the floor. And in exchange for  
1528 that, some real guarantees for the minority to offer amendments and to debate those  
1529 amendments and the bill.

1530 Now, whether that is a tradeoff that would be acceptable to the minority, I am  
1531 actually very dubious about that. If some kind of a tradeoff like that is not possible,  
1532 then we do fall back on the question of how the majority can change the rules without  
1533 making the case that the Constitution allows it to do so by a simple majority.

1534           Mr. Ornstein. I would love to see this handled informally. I have sympathy for  
1535 the minority. I must say, though, one problem that I have seen and I mention in my  
1536 testimony, we have had a number of bills that ended up passing unanimously or near  
1537 unanimously that had to go through filibusters on the motions to proceed and on the  
1538 bills themselves and took days and days. I mention a nomination for a court of appeals  
1539 where this poor woman was held twisting in the wind for months and months and then  
1540 ultimately got through on a near-unanimous vote.

1541           The only reason for doing that--this is not about the concerns about having an  
1542 opportunity to debate. This is to stretch out an agenda. And so you have got to  
1543 come to an agreement, and whether that agreement can be reached, I don't know.

1544           More generally, I just believe that people who make the sacrifice for public  
1545 service deserve at some point a vote, and in almost every instance, it ought to be an up  
1546 or down vote. And so I don't think you can achieve that without some change in the  
1547 rules that takes nominations to a different level, and it seems to me that there may be  
1548 some opportunity there for a bipartisan agreement. You are going to have to do some  
1549 mix of informal negotiations between leaders and among members, and I hope some  
1550 bipartisan consensus on a modest package of rules changes, but I don't see any other  
1551 way out.

1552           Chairman Schumer. Obviously, if we had bipartisan consensus, we wouldn't  
1553 have to debate whether we need 67, 60, or a majority.

1554           Mr. Ornstein. Yes.

1555 Chairman Schumer. Senator Bennett?

1556 Senator Bennett. Thank you, Mr. Chairman, and thanks to both of you for your  
1557 patience today and your thoughtful consideration.

1558 Mr. Ornstein, I would make just one comment about the objection to the motion  
1559 to proceed. I will not speak for Senator McConnell, but I have been at the leadership  
1560 tables where the decisions are made as to whether or not we will object to a motion to  
1561 proceed, and in every instance, there is a significant negotiation that takes place where  
1562 this becomes ultimately his ultimate weapon in his conversations with Senator Reid. It  
1563 is not entered into lightly. Okay, Senator Reid, we will give you the motion to proceed  
1564 if we can have your word that the following things will happen. And again, I am not  
1565 privy to any of the conversations, only as they get reported in the leadership table, and I  
1566 am going to be very careful not to violate any confidentiality that comes out of that.

1567 It is my guess, I will put it that way, that there are circumstances where Senator  
1568 Reid would like to accommodate Senator McConnell but feels he cannot because of the  
1569 reaction he would get within his conference. And it is my guess that there are times  
1570 when Senator McConnell would like to be more accommodating to Senator Reid but  
1571 cannot because to do so would arise the ire of the Republican Conference.

1572 I remember Senator Dole saying to me, "I am supposed to be the leader around  
1573 here," and this was when we were in the minority, and, he said, "I have got 42  
1574 independent contractors I have to deal with," every one of which has the right to object  
1575 to a unanimous consent agreement and without giving any hint of circumstances or

1576 context. I have seen Senator McConnell be frustrated in a very legitimate kind of  
1577 action that he would like to proceed with, frustrated by a single Senator who refused to  
1578 give a unanimous consent agreement. And I have seen Senator Reid in the same  
1579 circumstance, where a single Senator on his side has caused Senator Reid to, perhaps  
1580 injudiciously, but I will protect him, make some less than flattering comments about a  
1581 member of his own conference, as we then end up in the situation where we do.

1582         The only other comment I would make, I think the--and I do lay this at Tom  
1583 Daschle's door because he is the first one I saw who used it--the inability to appoint  
1584 conferees by unanimous consent was always done. The leader picked the name. The  
1585 unanimous consent agreement was made. The conferees were appointed. And  
1586 Senator Daschle was the first one that I saw who said, no, we will not allow you to  
1587 appoint conferees. We will allow you to pass the bill. Indeed, we will vote for it so  
1588 we get credit with our constituents as being in favor of it. But we will not allow the bill  
1589 to ever survive because we won't allow you to appoint conferees. And that gives the  
1590 minority power to dictate the results of the conference.

1591         And one of the things that has disturbed me, Mr. Chairman, as much as all of the  
1592 filibusters and the holds, is that we are not having conferences anymore.

1593         Chairman Schumer. That is true. That is true.

1594         Senator Bennett. When I first came here, it was, okay, we are going to write  
1595 this bill in conference. We understand we have got to work with the House. We  
1596 have got to work this out. We will write the bill in conference, and it goes through.

1597 Okay, take that amendment in order to get to conference. And increasingly, we are  
1598 not having any conference.

1599 So I say somewhat facetiously, the Senate is superbly structured to deal with the  
1600 problems of the 19th century and we need to, whether it is done with precedent or  
1601 whether it is done with rules changes or whether it is done with greater comity within  
1602 the various conferences, we do have a problem.

1603 That being said, I reserve the right to object to anything you want to do--

1604 [Laughter.]

1605 Senator Bennett. --with respect to changing the rules. Thank you.

1606 Chairman Schumer. And on that happy note--

1607 [Laughter.]

1608 Chairman Schumer. This was a great hearing. My only wish is that every one  
1609 of our colleagues could have witnessed it, and maybe they will look at parts of it. It  
1610 really has helped shed light on the big problems we all agree we face, even if we can't  
1611 yet agree on solutions.

1612 I thank the witnesses here--

1613 Mr. Ornstein. Thank you very much, Mr. Chairman.

1614 Chairman Schumer. --and the earlier witnesses. I thank my fine colleague,  
1615 Senator Bennett.

1616 The hearing is adjourned.

1617 [Whereupon, at 12:33 p.m., the committee was adjourned.]